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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 623

CARL F. DELANO,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT OF PETITION

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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To the Honorable, The Chief Justice of the United States, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

(Figures in parentheses refer to pages of the record as printed for the court below unless context clearly indicates otherwise)

The petitioner above named seeks, under Title 28, Section 344, United States Code Annotated, being Section 237 of the Judicial Code and Rule 38 of the rules of the Supreme Court of the United States, Writ of Certiorari to the Supreme Court of the State of Michigan to review the judgment filed October 13, 1947, affirming the conviction and sentence of the petitioner and to review the order entered by the Supreme Court of the State of Michigan on December 3, 1947, denying petitioner's petition for a rehearing to said court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner herein was charged with the crime of conspiracy in a warrant issued on the 6th day of December, 1944, by the Honorable Leland W. Carr, Judge of the Circuit Court for the County of Ingham and State of Michigan, acting under sections 17217 and 17218 of the Compiled Laws of the State of Michigan for the year 1929 as amended, as a so-called "One Man Grand Jury" (Note: Warrant omitted here, same appears as Appendix II in back of brief.) in a proceeding commenced on the complaint of Herbert J. Rushton, Attorney General for the State of Michigan, for a judicial investigation concerning certain criminal offenses. The testimony upon which the warrant was based was taken before the Honorable Leland W. Carr, Circuit Judge, as such "one man grand jury" and the warrant was based upon such testimony.

Petitioner was apprehended, demanded an examination, which was held in the Circuit Court for the County of Ingham, Michigan, with the said Honorable Leland W. Carr sitting as examining Magistrate on January 9, 1945 (14) at which time Mr. Kim Sigler, now Governor of the State of Michigan, appeared as special prosecuting attorney for the People and Mr. H. H. Warner, now the Governor's legal advisor, appeared as his assistant. Testimony of the People's witness, Harry R. Williams, was taken. At the conclusion of proofs at the examination petitioner moved that the complaint be dismissed for the reason that the evidence failed to show that petitioner committed any crime and failed to show any conspiracy in which he took part (240). Whereupon the examining Magistrate, the Honorable Leland W. Carr, held the petitioner and others to trial to the Circuit Court for the County of Ingham (246-248).

An information was filed on January 16, 1945, (11). The information substantially followed the warrant.

A motion to Quash was filed by petitioner on February 13, 1945, in the Circuit Court for the County of Ingham,

Michigan, (872) based on the grounds that the prosecution of petitioner was in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and that the manner in which it had been carried out deprived the defendant petitioner of life, liberty and property without due process of law and denied him the equal protection of the laws as guaranteed by the said Fourteenth Amendment to the Constitution of the United States (873). Also because the warrant and information did not charge any common law offense nor any offense defined by the statute of the State of Michigan, and other reasons (874). This motion was heard before the same Honorable Leland W. Carr sitting as Circuit Judge for the County of Ingham, State of Michigan, and on Tuesday, February 20, 1945, said Motion to Quash was denied by the Honorable Charles H. Hayden, Circuit Judge, and the Honorable Leland W. Carr, Circuit Judge (786). Judge Hayden did not sit at the hearing on this motion, and has never, at any time, taken any part in this case.

On February 23, 1945, petitioner moved for a separate trial in the Circuit Court for the County of Ingham, State of Michigan, (875) in which petitioner raised his constitutional right to a fair trial guaranteed to him by the provisions of the Fourteenth Amendemnt to the Constitution of the United States, and Sec. 16, Article II of the Constitution of the State of Michigan, and other reasons (877). This motion was also heard before the Honorable Leland W. Carr, sitting as Circuit Judge in the Circuit Court for the County of Ingham, State of Michigan, and on February 24, 1945, an order was entered denying the Motion for Separate Trial of the petitioner by the Honorable Charles H. Hayden, Circuit Judge, and Honorable Leland W. Carr, Circuit Judge. Judge Hayden did not sit at the hearing on this motion, and took no part therein.

On February 26, 1945, the case above described, in which petitioner was one of the respondents, was brought on for trial before the Honorable John Simpson, Circuit Judge for the County of Jackson, State of Michigan, Victor C. Anderson, Prosecuting Attorney for Ingham County, Mich-

igan, Mr. Kim Sigler, special prosecutor, and Mr H. H. Warner appeared on behalf of the People.

During the trial and beginning almost simultaneously with the commencement thereof and continuing until the close thereof, the special prosecutor, Mr. Sigler, persisted in a continuous, studied and calculated course of conduct consisting of derogatory remarks with the intention of placing defendants' counsel upon the defensive, of breaking up their examination of witnesses and of prejudicing the jury against them and their clients. The special prosecutor, Mr. Sigler, had been engaged in the trial of cases arising out of the aforesaid grand jury and had had considerable success and had secured a number of convictions; the grand jury proceedings and the trials resulting therefrom had been headlined in the great metropolitan dailies of Detroit and other state papers. Mr. Sigler was the most talked of man in Michigan at that time and was later elected Governor because of his work as special prosecutor and because of the publicity given him as a result thereof. This question is raised by assignments of error as follows: Assignment of Error 9 (804); A of E 21 (805); A of E 24 (806) to A of E 28 (808) inclusive; A of E 31 and 32 (809); A of E 34 (810); A of E 37 (812) to A of E 39 (813) inclusive; A of E 42 and 43 (814); A of E 46 (816) to A of E 57 (821) inclusive; A of E 61 (823); A of E 64 (824); A of E 66 (825); A of E 67 (826); A of E 69 (827); A of E 72 (828) to A of E 78 (831) inclusive; A of E 80 (832); A of E 84 (834) to A of E 86 (835) inclusive; A of E 88 (836) to A of E 90 (837) inclusive; A of E 92 (838) to A of E 96 (840) inclusive; A of E 99 (841) to A of E 123 (852) inclusive; A of E 125 (853) to A of E 159 (870) inclusive; A of E 161 and 162 (871), being one hundred twelve Assignments of Error on the special prosecutor's derogatory and prejudicial remarks and statements.

At the conclusion of the State's proofs petitioner moved for a directed verdict of not guilty (648) on the grounds that no conspiracy had been shown and that a charge of conspiracy could not be based upon a count charging a certain group with "giving" and another group with "tak-

ing" and that the information did not charge an indictable offense under the common law. This motion was renewed at the close of all of the proofs (733) whereupon the court denied all motions for directed verdicts. Petitioner was convicted by verdict of the jury and sentenced to serve three to five years in the State Prison of Southern Michigan at Jackson, Michigan.

Motion for new trial on behalf of petitioner was filed April 3, 1945. This motion raised all of the questions heretofore raised by petitioner including the following:

"15. Because the arrest, arraignment, trial, conviction and sentence of the respondent, Carl DeLano, violates the provisions of the 5th and 14th Amendments to the Constitution of the United States in that the said respondent, Carl DeLano, has been deprived of liberty and property without due process of law and that he has been denied the equal protection of the laws as guaranteed by the said 14th Amendment to the Constitution of the United States" (880). Also petitioner claimed the right to a new trial because of the prejudicial misconduct of the special prosecutor, Mr. Kim Sigler (878). An answer to this motion was filed on April 10, 1945, by the People. The same was brought on for argument before the Honorable John Simpson, Circuit Judge, and was denied on April 10, 1945, by the Honorable John Simpson, the Honorable Leland W. Carr and the Honorable Charles H. Hayden, Circuit Judges (788). (Judge Hayden took no part).

An appeal was taken from the Circuit Court for the County of Ingham to the Supreme Court of the State of Michigan, Bill of Exceptions being filed in that court on March 19, 1946 (14).

The court, on October 13, 1947, affirmed the decision of the Circuit Court for the County of Ingham, State of Michigan, in all respects (Supplemental Record 1-19).

On October 24, 1947, petitioner filed a petition for rehearing with supporting brief (SR20). This motion was denied on December 3, 1947 (SR 49).

The opinion of the Supreme Court of Michigan is final and is reported in 318 Mich. 557 and 28 NW (2d) 909, the Supreme Court of the State of Michigan being the highest appellate Court of that state.

Mr. Kim Sigler, special prosecutor for the grand jury and in the trial of this case, is now Governor of the State of Michigan, having been elected and having taken office on January 1, 1947. The Honorable John Dethmers was elected Attorney General of the State of Michigan in the Fall election of 1944 and took office on January 1, 1945. He was Attorney General during the time in which this case was pending in the Circuit Court for Ingham County, Michigan, and during the time of taking the appeal in this cause and up to the latter part of 1946 when he was appointed a Justice of the Supreme Court of Michigan by Governor Harry F. Kelly. He was elected in the Spring election of 1947 and is now, and has been since said appointment, a member of that Court. The Honorable Leland W. Carr was appointed to the Supreme Court of Michigan by the then Governor, Harry F. Kelly, in the Fall of 1945 and has, ever since then, continued to be, and now is a member of said Court.

It appears from the supplement to the record filed herein that the Honorable John Dethmers participated in the decision affirming the conviction of petitioner although he was, at the time of the said prosecution, the chief prosecuting officer of the state. It appears also from said supplement to the record that he participated in the denial of the motion for rehearing in the Supreme Court contained in said supplement.

The office of Attorney General in the State of Michigan is a constitutional office created by the constitution of the State of Michigan, Article VI, Sec. 1. His duties are defined by statute. Section 176 of the Compiled Laws of Michigan for 1929 provides that the Attorney General shall prosecute and defend all actions in the Supreme Court in which the state shall be interested or a party and that whenever, in his judgment, the interests of the state require it he may intervene in and appear for the people

of this state in any other court or tribunal "in any cause or matter, civil or criminal, in which the People of this state may be a party of interest". Section 178 provides that "The Attorney General shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices; and he shall make and submit to the Legislature, at the commencement of its session, a report of all official business done by him during the two years preceding, specifying suits to which he has attended, the number of persons prosecuted, the crimes for which, and the counties where such prosecutions were had, the results thereof, and the punishments awarded."

The Michigan Supreme Court held *In re Watson*, 291 N. W. 652; 293 Michigan 263 that the Attorney General may intervene in any criminal proceeding in the state, and he has supervision of all prosecuting attorneys.

The records of the Supreme Court of the State of Michigan, in this case, will show that in all matters in and about the said appeal wherein service of papers or briefs or records were required, either by rule or statute, service was made upon the Attorney General or one of the Assistants Attorney General and members of his staff and that the case was argued orally before the Supreme Court of the State of Michigan by a member of the Attorney General's staff appearing for the People of the State of Michigan. Also that the briefs on behalf of the People were prepared by the Attorney General's department of the State of Michigan.

THIS COURT HAS JURISDICTION

This is an appeal by certiorari to review the final judgment and determination of the Michigan Supreme Court of the matters set forth in this petition, substantial Federal questions having been timely raised in the Circuit Court for the County of Ingham, State of Michigan, and the Supreme Court of that state. The Court has jurisdiction under Title 28, Section 344 and 350, U.S.C.A. Sec. 237 of the Judicial Code as amended and Rule 38 of the rules of the Supreme Court of the United States.

THE QUESTIONS PRESENTED

1. It was prejudicial error and a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and a denial of due process as provided in said Section, for the Honorable Leland W. Carr, now Justice of the Supreme Court of Michigan, after having sat as the "one-man grand juror" to sit as examining magistrate and pass upon the sufficiency of his acts as grand juror in issuing the warrant set forth in the petition.

2. It was prejudicial error and a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and a denial of due process, as provided in said Section, for the Honorable Leland W. Carr, now a Justice of the Supreme Court of Michigan, to sit as a Circuit Judge at the hearing and the denial of a motion to quash filed by petitioner after he had held the petitioner and others for trial to that court as examining magistrate, thereby passing upon his official act and the sufficiency thereof in holding the respondent for trial. The above two questions were raised by Assignment of Errors 1 to 8, inclusive (803).

3. The continuous, studied and wilful prejudicial conduct of the special prosecuting attorney in remarks and statements made by him during the said trial were a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and a denial of due process as provided in said section and prevented a fair trial of the issue involved and a fair consideration of the evidence by the jury. This question is raised by Assignment of Error heretofore set forth in the Summary Statement of Matters Involved.

4. It was improper and a violation of petitioner's constitutional right to a fair and unprejudiced review of his conviction in the Circuit Court for the County of Ingham and a violation of the respondent's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and a denial of due process of law as stated therein for the Honorable John Dethmers, now a

Justice of the Supreme Court of the State of Michigan, and Attorney General during the pendency of this case in the Circuit Court for the County of Ingham and on appeal to the Supreme Court for the State of Michigan, to sit as a member of the court in the conferences and upon the hearing of petitioner's appeal and participating in the decision thereof as shown in the opinion of the court (S.R. 1-19), the Attorney General of the State of Michigan being the chief prosecuting officer of the state and the opposite party in all criminal proceedings and the said grand jury being based upon the petition of his predecessor in office, Herbert J. Rushton, Attorney General and entitled as follows: "IN THE MATTER OF THE COMPLAINT OF HERBERT J. RUSHTON, ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, FOR A JUDICIAL INVESTIGATION CONCERNING CERTAIN CRIMINAL OFFENCES" (7).

5. The trial court and the Supreme Court of the State of Michigan, improperly and in violation of petitioner's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, held that conspiracies to give and receive bribes constitute a common law offense and that there was such a common law conspiracy as alleged in the warrant and information in this cause. This question was raised by Assignments of Error No. 1 (785, 803), 8 (803), 10 (648, 804) and 11 (732, 804).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Substantial Federal questions are presented with respect to the scope of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. In this case the petitioner has been denied due process of law as set forth in said Amendment. His privileges and immunities have been abridged. He has not had a fair trial nor a fair review of his case in the Supreme Court of the State of Michigan. He is entitled to the protection of the Amendment. He was entitled to an examination before an unprejudiced examining magistrate

after his arraignment. This was not given him but he was compelled to proceed to an examination before an examining magistrate who had been and was the grand juror and had passed upon the sufficiency of the grand jury testimony in issuing the warrant against petitioner. He was entitled, under the Fourteenth Amendment, to the processes of law and the procedure set up by the Legislature of the State of Michigan in its Code of Criminal Procedure. The right to an examination is one of these rights and a part of the procedure so set up. Having been bound over for trial by the examining magistrate he was entitled to have the question of the sufficiency of the evidence taken at the examination inquired into to determine whether or not there was sufficient evidence to, first, prove that the crime charged had been committed and, second, that there were reasonable grounds to believe that the petitioner committed it, by a disinterested and impartial Circuit Judge who had not previously determined the questions raised. This procedure is also part of the procedure in criminal cases provided by the Legislature of the State of Michigan.

3. Instead of a disinterested, impartial Circuit Judge who was not prejudiced and who had no preconceived notions of petitioner's guilt, he was required to proceed with his motion to quash before the same judge who had and was acting as the grand juror, and had acted as the examining magistrate in holding petitioner for trial and thereupon reviewed the sufficiency of the proceedings against petitioner which he had already, in two instances, found and determined to be sufficient.

4. The Writ of Certiorari should also be issued for the reason that the petitioner was not given a fair trial in the Circuit Court for the County of Ingham. He and his counsel and other defendants and their counsel were subjected to a continuous fire of derogatory statements indulged in by the special prosecutor, Mr. Sigler, now Governor, which influenced the minds of the jury and prevented them from properly weighing the evidence in the case and which tended to shape their verdict. These remarks of the special prosecutor are set forth in the rec-

ord and exceptions and Assignments of Error were duly made and taken to them. This conduct on the part of the special prosecutor was premeditated and made with the object in view of discrediting the respondents and their attorneys and to bring about the verdict of guilty, which is also a violation of the Fourteenth Amendment to the Constitution of the United States.

5. The Fourteenth Amendment to the Constitution of the United States was also violated in not according to the petitioner a fair and impartial review by the Supreme Court of Michigan of the errors assigned by him committed during the process of the trial in the Circuit Court for the County of Ingham.

6. The Honorable John Dethmers, now a Justice of the Supreme Court, was Attorney General and chief prosecuting officer of the state during practically all of the time that the case was pending in the Circuit Court for the County of Ingham and during practically all of the time that the appeal was pending in the Supreme Court of the State of Michigan, up to and after the settlement of the bill of exceptions and the filing of the printed record in this court. At the argument of this cause on June 12, 1947, before the Supreme Court of the State of Michigan, Justice Dethmers sat and participated in the opinion, being for affirmance of the judgment against petitioner in the Circuit Court for the County of Ingham, as more fully appears by reference to the opinion of the Supreme Court (S.R. 1-19). This is also claimed to be a violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that petitioner was denied due process of law as provided therein.

7. Also the trial court and the Supreme Court of Michigan improperly and in violation of petitioner's constitutional rights so guaranteed to him by the Fourteenth Amendment to the Constitution of the United States held that the warrant and information filed against him set up an offense at common law and charged a common law conspiracy. Petitioner believes that the record shows that he has been substantially injured by the rulings of the

Circuit Court for the County of Ingham which were affirmed by the Supreme Court of the State of Michigan and that the decision of the Supreme Court of Michigan involves an infringement of the provisions of the Constitution of the United States above set forth.

8. The question of whether the grand juror may act as examining magistrate and also as Circuit Court Judge in the same proceeding has not been heretofore determined by this court and should now be determined by it.

9. The Supreme Court of Michigan held in this case that the charge in the complaint and warrant constituted a common law offense and that there was such a common law conspiracy as alleged in the warrant and information. Certiorari should be issued on this ground for the reason that Michigan, having adopted the common law and there being no statute defining or punishing such a conspiracy as set forth in the State of Michigan, the Michigan Supreme Court is bound by the common law as it existed at the time of its adoption and can not go beyond the common law as it existed at that time and legislate into the judicial system of Michigan an offense not known at common law or defined by the statutes of that state. This holding on the part of the Supreme Court of Michigan is contrary to the decisions of the courts of the United States as will be more fully hereinafter set forth in the brief filed in support hereof.

Respectfully submitted,

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All of Jackson, Michigan.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. --------

CARL F. DELANO,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The jurisdiction, a recital of the contents of the opinion below and the statement of facts have been fully set forth in the petition for writ of certiorari.

POINTS RELIED UPON

I.

Under the due process of law amendment to the Constitution of the United States the petitioner was entitled to have procedure established by law for criminal cases followed in his case.

II.

The petitioner was entitled to have his case heard upon examination before a judge or magistrate who had not previously determined it.

III.

The petitioner was entitled to have his case reviewed in an appellate court by a court none of whose members

were disqualified by law to sit and determine the issues involved.

IV.

The petitioner was entitled to a fair trial.

V.

The petitioner was prosecuted for an alleged offense not known to the common law and not defined by statute and was, therefore, denied due process of law.

SCOPE OF ARGUMENT

"Due process of law" in a criminal prosecution consists of a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, * * * trial according to established procedure, and discharge unless found guilty. 16 *Corpus Juris Secundum*, pg. 1171. All of these elements of "due process" are lacking in the instant case and all will be covered in this brief.

I.

Under the "Due Process of Law" Amendment to the Constitution of the United States the Petitioner was Entitled to have the Procedure Established by the Law in Criminal Cases followed in his Case.

The criminal procedure established in the State of Michigan provides that where a defendant is charged with a felony he shall be entitled to an examination. The so-called one man grand jury act, being *Section 17215 through 17220 of the Compiled Laws of Michigan for 1929*, provides what was intended to be a short and informal proceeding for the discovery of a crime. *Section 17217* provides that when a complaint is made before any Justice of the Peace, Police Judge or Judge of a court of record and they shall have probable cause to suspect that a crime has been com-

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(Italics ours throughout unless otherwise noted).

mitted upon the application of the prosecuting attorney, he shall require such person to attend before him as a witness and answer such questions as may be put to him concerning any violation of the law.

Section 17218 provides that if, upon such inquiry, the Justice or Judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may require their apprehension by proper process and that upon return of such process "the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint". To determine what is the manner of procedure upon a formal complaint we refer to *Section 17196 of the Compiled Laws of Michigan for 1929* which provides that "the magistrate before whom any person is brought upon a charge of having committed an offense not cognizable by a Justice of the Peace, shall set a day for examination not exceeding ten days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath and in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent".

It will be noticed that the above section does not authorize an examination before a judge of a court of record. A circuit judge is not a magistrate within the meaning of this statute.

Such examination is required unless the accused shall waive his right to such examination. *Section 17256 of the Compiled Laws of Michigan for 1929.*

It has been held in *People vs. Dochstader,* 274 Mich. 238; 264 N. W. 356 that one can not be prosecuted for a felony until he has been given a preliminary examination by a justice of the peace or other lawful officer unless such examination is waived and that such examination is jurisdictional and that the accused can not be held for trial or bound over to the Circuit Court for trial unless and until the examining magistrate shall have found that the crime charged has been committed and that there is reasonable

grounds to believe the accused committed it. It will be seen from the above that the Circuit Judge of Ingham County, Michigan, had no power to conduct an examination even though he may have been the grand juror, proceeding under Sections 17217 and 17218 of the Compiled Laws of Michigan for 1929. It was necessary that he follow the statute and proceed as upon formal complaint, that is, by turning the matter over to a justice of the peace or Municipal Judge or other magistrate to act as examining magistrate in this case. * *

To construe such sections, 17217 and 17218, as the Michigan Supreme Court has construed them in *People vs. McCrea*, 303 Mich. 213; 6 N. W. (2d) 489, supra, to the effect that the grand juror may act as examining magistrate is to give them an effect which is in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives the accused of a hearing before a magistrate who has not previously heard and determined the issues involved, of which more will be said later.

The Michigan Supreme Court, in the McCrea case said: "The 'due process of law' clause of the Federal and State Constitutions does not require a preliminary examination in criminal proceedings." In this the court was in error. The right to an examination has been determined by the Legislature of the State. It is a part of the orderly procedure prescribed by the Legislature in all criminal cases above the crime of misdemeanor and a deprivation of that right is a deprivation of due process of law.

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* * Sec. 17256, Compiled Laws of Michigan for 1929: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer unless such person shall waive his right to such examination * * *."

Petitioner has not had an examination as required by law. Therefore, he should have been discharged by the Supreme Court of the State of Michigan. The court has confused the holdings of this court and others "that a preliminary examination is not essential to due process of law in the sense that a statute providing for the accusation and trial of accused persons without a preliminary examination is unconstitutional". *12 Corpus Juris*, #976, pg. 1204. This rule applies only in cases where the examination is not a part of the procedure set up by the state courts in criminal cases and does not apply to proceedings in the State of Michigan.

II.

The Petitioner was entitled to have his case heard before a Judge or Magistrate who had not previously determined it.

It has been held that the right to a hearing before a judge who has not determined the issue in advance shall not be denied where a determination of guilt may result in a deprivation of liberty or property. 16 *C. J.* Sec. P. 1171. *Sharkey vs. Thurston*, 196 N. E. 766.

The Michigan Supreme Court has construed Section 17218 of the Compiled Laws of Michigan for 1929 as giving the grand juror the right to conduct an examination. We contend that such a construction is erroneous. If such a construction is correct then the statute is in violation of the Constitution because it then deprives the accused of the right to have the matter determined by a magistrate who has not previously determined it. The proof which would authorize the examining magistrate to hold the accused for trial must be presented in open court at the examination and can not be based upon evidence secretly taken before a so-called one man grand jury. The statute, *Section 17218*, must be construed together with the statutes providing for an examination in criminal cases above referred to, being *Sections 17196 and 17256 of the Compiled Laws of Michigan for 1929.*

The Legislature of Michigan realizing either the unfairness of the interpretation of Section 17218 or that the statute as construed was unconstitutional, amended the Act by *Act No. 33 of the Public Acts of 1947* which provides "that the justice or judge conducting the inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment or from proceeding in any trial arising therefrom or from hearing any motion to dismiss or quash any complaint or indictment".

The law of Michigan also provides the accused has a right, in case he is held for trial and the testimony before the magistrate does not prove that a crime has been committed and that there are reasonable grounds to believe that the accused committed it, after the information is filed against him in the Circuit Court, to move to quash the information. *People vs. Dachstader,* 274 Mich. 238; *People vs. Lee,* 231 Mich. 607; 204 N. W. 642.

In this case petitioner moved to quash on the grounds stated therein (872) but instead of the matter being heard by a disinterested judge of the Circuit Court for the County of Ingham, Michigan, Judge Carr temporarily discarded his office as grand juror and heard the matter as a Circuit Judge, thereby determining that which he had previously twice determined against the petitioner. Order procedure required that the motion to quash be heard by a judge of the Ingham County Circuit Court who had not previously determined the question.

III.

The Petitioner was entitled to have his case reviewed in an Appellate Court by a Court none of whose members were disqualified by Law to sit and determine the issues involved.

Justice John Dethmers was Attorney General of the State of Michigan during the time of the trial of this case in the Circuit Court for the County of Ingham and during all of the time that the matter was being appealed to the

Supreme Court up to some time in the Fall of 1946 when he was appointed to the Supreme Court to fill a vacancy. During that time the case was tried, the matter was appealed to the Supreme Court, the bill of exceptions settled and filed and the record printed, bill of exceptions being filed March 19, 1946 (14), and petitioner's brief was filed September 11, 1946.

The office of Attorney General of the State of Michigan is created by Article VI, Section 1 of the Constitution. His duties are defined by Section 176 of the Compiled Laws of Michigan for 1929. The statute provides that he shall prosecute and defend all actions in the Supreme Court in which the State shall be interested or a party and that whenever, in his judgment, the interests of the state require it, he may intervene and appear for the people of this state in any other court or tribunal "in any cause or matter, civil or criminal, in which the People of this state may be a party of interest". *Section 178 of the Compiled Laws of Michigan for 1929* provides that "The Attorney General shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices; and he shall make and submit to the Legislature, at the commencement of its session, a report of all official business done by him during the two years preceding, specifying suits to which he has attended, the number of persons prosecuted, crimes for which, and the counties where such prosecutions were had, the results thereof, and the punishments awarded." (See abstract from the Attorney General's Report in Appendix).

The Michigan Supreme Court held *In re Watson*, 293 Mich. 263, 291 N. W. 652, that the Attorney General may intervene in any criminal proceeding in this state and that he has supervision of all prosecuting attorneys. That being so the Attorney General is the chief prosecuting officer of the state and the opposite party in all criminal proceedings. As stated in the petition all services of papers, briefs or records which were required by rule or statute, were made upon the Attorney General, Mr. Dethmers, during the time he was in office, either by delivering same to his office or to one of his assistants Attorney General,

as will more fully appear by the records of the office of the Clerk of the Supreme Court of Michigan. Also the brief by the People in this cause bears upon its cover the names of Eugene F. Black, Attorney General, successor to the Honorable John Dethmers, Edmond E. Shepherd, Solicitor General who was Solicitor General under the Honorable John Dethmers, and H. H. Warner and Victor C. Anderson, Assistants Attorney General. The oral argument for the People in the Supreme Court of Michigan was made by the Honorable Edmond E. Shepherd, Solicitor General, a member of Judge Dethmers' staff while he was Attorney General and continued as such under his successor, Eugene F. Black.

We contend that such a procedure has never been heard of in the State of Michigan or anywhere else. It has long been the custom of Attorney Generals of the United States, who become members of the Supreme Court of the United States, to refrain from sitting in any case pending during their term of office. In this case the reason for the disqualification of Judge Dethmers is more apparent because the proceeding for the so-called one man grand jury was instituted by his predecessor in office, the Honorable Herbert Rushton, Attorney General. The official report of this case is found in *318 Mich. 557*. On page 560 the following are named as representing the People of the State of Michigan: "Eugene F. Black, Attorney General, H. H. Warner and Victor C. Anderson, Assistants Attorney General, and Richard B. Foster, special assistant prosecuting attorney, for the People." The same parties also are named as representing the People in the report of the case in *28 N. W. (2d), 909*.

Judge Dethmers, notwithstanding his disqualification, sat as one of the hearing justices, participated in the conferences on this case and participated in the decision and was for the affirmation of the judgment of the court below (S.R. 1-19). We contend that the sitting of Judge Dethmers was without precedent and are, therefore, unable to cite any authorities except that we think this matter comes within the ruling of *Sharkey vs. Thurston*, 196 N. E. 766, supra. It will be noted also that Judge Deth-

mers sat and considered the motion for re-hearing filed herein and which was denied (S. R. 49). Also that the order denying the motion for re-hearing bears the name of Leland W. Carr, Chief Justice (S.R. 49). If Judge Carr did so participate then petitioner has not had fair consideration of his motion for re-hearing and due process of law has again been denied him.

IV.

It was the Court's duty to insist that accused be fairly tried and denial of that fair and impartial trial guaranteed by Law amounts to a denial of "Due Process of Law" *People vs. Lynch*, 140 P. (2d) 418; *Brown vs. State*, 266 P. 746.

Petitioner was entitled to a fair trial. This he did not receive. The special prosecuting attorney, now Governor, at the very beginning of the case, without provocation of any sort and certainly not in the heat of argument, made certain prejudicial and derogatory remarks directed to defendants and their counsel in the presence of the jury, which said remarks were calculated to and did bias the jurors in the consideration of the case and resulted in a miscarriage of justice. This course of conduct was premeditated and was calculated to bring about what was denounced in this court, in the case of *Mooney vs. Holohan*, 294 U. S. 103; 55 Sup. Ct. Rpr. 340, as a "contrived conviction". In the Mooney case the attorney general insisted that the petitioner's argument was based on a fallacy, "That the acts or omissions of a prosecuting attorney can never, in and by themselves amount either to due process of law or to a denial of due process of law." The court said:

> "Without attempting at this time to deal with the question at length we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the

> state, embodies the fundamental conceptions of justice which lie in the base of our civil and political institution. (citation of cases). It is a requirement that can not be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured. *Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary rules of justice as is the obtaining of a like result by intimidation.* And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment."

This court said in *Buchalter vs. People of the State of New York*, 319 U. S. 427, 63 Sup. Ct. Rpr. 1129, that

> "The 'due process' clause of the Fourteenth Amendment requires that action by the state through any of its agencies must be consistent with fundamental principals of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as the 'law of the land'."

The court also said, that where the arguments of counsel for defendant apparently provoke statements by the district attorney there was no due process of law question. There was no provocation in petitioner's case. The record shows that all of the attorneys for the defendants acted with admirable restraint, that none of the vicious and uncalled for remarks or statements of the prosecuting attorney were provoked in any sense. It was part of a plan conceived in advance of the trial and carried through to its conclusion, over a period of approximately three weeks, consisting of 112 derogatory, vicious and uncalled for remarks on his part. Some of them, standing alone,

have no particular significance but all of them taken together reveal the plan clearly. Some of them are so vicious and uncalled for that any one of several of them was alone sufficient to warrant a reversal. In passing on this question the Supreme Court of Michigan said "We have examined the record carefully and note that the case was hotly contested, but we are not convinced that the remarks complained of influenced the jury adversely to the rights of the defendants". All of the heat was on the part of counsel for the People. If the Court read the record in this case carefully, as stated, it would have been aware of that fact. The court seems to have proceeded upon the theory that under the proof in this case the respondent was guilty, therefore no assignment of error, no matter how serious, and no misconduct on the part of the special prosecutor, no matter how reprehensible, should interfere with the affirmation of this case. This is contrary to the rule laid down by this court in the case of *Powell vs. State of Alabama*, 287 U. S. 45, 53 Sup. Ct. Rpr. 58:

> "However guilty defendants, upon due inquiry, might prove to have been, they were until convicted presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no incident of a fair trial."

The court did not see that petitioner was denied "no incident of a fair trial". The special prosecutor took charge of the proceeding, did and said what he pleased, and conducted himself in line with his premeditated plan. He even went so far as to tell counsel for petitioner where to stand when examining a witness. Attention is called to Assignment of Error No. 77 (831) in which Mr. Sigler claimed that counsel for petitioner was obstructing the view of a juror. The record will show that attorney for petitioner was questioning the witness upon the contents of an exhibit which the witness held in his hand. Mr. Sigler said, "Do you want Mr. Squires to see what is going on?" "Mr. Blackman: He hasn't complained about it." "Mr. Sigler: Perhaps he is too much of a gentleman to

ask you to step aside." The juror's view was not obstructed. It was impossible, for lack of space, to argue all of the Assignments of Error on this subject.

Mr. Sigler's idea of how to try a criminal case and the rights of respondent's counsel is set forth in the following (710). Mr. Kennedy represented Dr. Alden and asked about the scope of rebuttal testimony and said "You are going to call the witness right in here?" "Mr. Sigler: *Why don't you sit down and be patient, and be a nice boy, and we will tell you all about it?*" However, defendants' counsel are not required to sit down and be patient. They have a right to know what the prosecuting attorney expects to show in rebuttal in order that an objection might be based thereon.

The Assignments of error and the reference to the paging of the record printed for the court below are found in the petition for certiorari. However, here are a few of the 112 statements made by the special prosecutor:

(271) "Mr. Sigler: In what regard? I object to that until he designates what he is talking about, what it shows in regard to him. Whether it means *he had big feet or whether or not a member of a certain committee, or what.*"

(272) "Mr. Sigler: *In addition to that the court has ruled and counsel ought to be courteous enough to follow the court's ruling, without arguing with him.*"

(275) "Mr. Sigler: *We are not trying this like a bunch of small boys, and I object to that kind of conduct on the part of counsel.*"

(290) Attorney for petitioner objected on the ground that the testimony offered was hearsay because there had been no proof of the corpus delecti. "Mr. Sigler: *Well, we will show you plenty before we get through.*"

(295) Addressed to counsel for petitioner: "Mr. Sigler: *We will have Williams here and he will testify to all you want to listen to.*"

(419) Addressing Mr. Platt: "Mr. Sigler: *You will be calling it a college pretty quick.*"

(419) "Mr. Sigler: (interrupting the witness) Wait a second, until counsel specifies what he means by handling the bill before the legislature. *His questions are so loosely framed, if a witness is not right on his toes every second it would be inaccurate.*"

(428) "Mr. Sigler: That is objected to until he specifies qualifications for what, — *to drive an automobile, or help his wife wash dishes, or what?*"

(449) "Mr. Sigler: (interrupting the witness) Exhibit 41, the 30th of April. *They raised some money, don't you know, to pay the boys.*

"Mr. Kennedy: Now, Mr. Sigler, you know better than that.

"Mr. Sigler: *No, that's what they did. That is what it says there.*

"Mr. Kennedy: I object to the statement of counsel.

"Mr. Sigler: *I am just trying to be helpful to my distinguished brother,* Your Honor."

After an examination of the records no such statement was found referring to money being raised for "*paying the boys*". Mr. Sigler admitted as follows: "Mr. Sigler: *No, not in the records.*"

(454) Mr. Sigler to Mr. Kennedy: "*You are doing a good job and I am going to object to a speech.*"

(463) Mr. Platt objected to going into matters which happened during the grand jury sessions. "Mr. Sigler: *Well, you don't need to become excited or disturbed. We are not going into that phase of it.*"

(467) Addressing Mr. Kennedy: "Mr. Sigler: *Well, you are not the only lawyer here though. You may be surprised to know that.*"

(539) To attorney for petitioner, who had the temerity to object to a leading question: "Mr. Sigler: *Just a second, if the court please, my obstreperous brother here, he knows that is not a proper foundation for a question or objection.*"

(522) Exhibits were being examined by attorneys for defendants. Mr. Sigler asked the whereabouts of a check for $1950.00 which attorney for petitioner was examining.

"Mr. Sigler: Where is that check?

"The Court: It is right over here.

"Mr. Blackman: This is $1950.00.

"Mr. North: It went down the line a minute ago.

"Mr. Sigler: *We don't want any hocus pocus here on the checks.*"

(588) During examination of a witness by Mr. North, one of counsel for defendants, the witness was asked if he did not order a special assessment. "Mr Sigler: *We have to sit here and watch you like a hawk, or you are going to get this record in improper shape, and then later come in and argue to the jury on something that is incorrect.*

"Mr. North: I object to that.

"Mr. Sigler: *The court please that is the way it is going nevertheless.*

"The Court: Well, go ahead, let's get along."

(595) To Mr. North: "Mr. Sigler: *No occasion for an attempt to cast any aspersions on it in the manner you have.*"

The following is particularly vicious and standing alone would warrant a reversal of this case. The record will show that there was only one check that had been introduced in evidence prior to this occasion. Mr. North was examining a witness with respect to something which had nothing to do with checks and the following prejudicial and unwarranted statement was made by Mr. Sigler: (603) "*Do you want them to see some of the graft checks too?*" It was understood by counsel for the defense, by the spectators, by the jury and by the press that Mr. Sigler was about to introduce checks in evidence which had been given to the defendants in payment of graft. No such checks were produced.

(605) "Mr. Watzel: I just wanted to get a picture of what it looked like.

"Mr. Sigler: *If you want a picture, we will give it to you.*

"Mr. Watzel: I assume this record will also speak for itself.

"Mr. Sigler: *If you do what are you fussing around with it for?*"

(607) Referring to Mr. North: "Mr. Sigler: *He is sitting here laughing. He ought to tell the rest of us so we can laugh.*"

(616) Interrupting examination by petitioner's counsel: "Mr. Sigler: *Wait a minute now. Let's not confuse somebody here.*

"Mr. Blackman: *I am not confusing anyone. I am not trying to confuse anyone, at least.*

"Mr. Sigler: *You are not going to, at least.*"

(620) Interrupting the cross examination by petitioner's counsel of the People's witness Williams: "Mr. Sigler: *You mean was he talking to himself after DeLano left the room?*

"Mr. Blackman: I object to that.

"Mr. Sigler: *The question is so silly, your Honor.*"

(621) "Mr. Blackman: I object to that. *I don't think it is silly.*"

"Mr. Sigler: *In other words, how can he tell him he is broke after DeLano has gone out of the room?*

"Mr. Blackman: The witness just testified that he may have walked down the hall with him."

(635) Addressing petitioner's counsel: "Mr. Sigler: *You haven't shown us anything yet, just been standing up and telling what you are going to do, trying to get something into this record you know you can't do.*

"Mr. Blackman: I haven't offered anything.

"Mr. Sigler: *You are just trying to get around offering it in evidence.*

"Mr. Blackman: I take exception to those remarks, Your Honor." (No ruling).

(635-6) Addressing one of the counsel for defendants Mr. Sigler said: "*There is an orderly, regular procedure*

to handle such a thing as this: Counsel is attempting, by a very, old, old trick to get something before the court and jury * * *."

(636) Addressing Mr. Blackman, counsel for petitioner: "Mr. Sigler: *There is a manner in which to be fair in the trial of these cases."*

Addressing Mr. North who had asked for permission to put in character witnesses prior to placing his client on the stand, Mr. Sigler said: *"And I know, that is an old, old procedure, to call a lot of character witnesses, Your Honor, to make the build up for the defendant when he takes the stand. I object to it. It has been done for years. Mr. North has practiced law a number of years, had a lot of experience, and knows that is the case. I will give any lawyer any help I can, to accommodate him, but I am not going to go for that one."*

(705) Addressing Mr. Kennedy, attorney for Dr. Alden: "Mr. Sigler: *Wait a minute, now, every time his witness gets in a hole, then he jumps in and tries to save him. It is an old trick Mr. Kennedy.*

"Mr. Kennedy: I don't resort to tricks, Mr. Sigler.

"Mr. Sigler: *Well, call it whatever you want to."*

And many others. These are only a few of the remarks made by Mr. Sigler taken at random from the record.

In discussing this matter counsel has in mind the ruling in *Buchalter vs. State of New York*, 319 U. S. 427, 63 Sup. Ct. Rpr. 1129, Supra, in which the remarks of the prosecuting attorney were provoked. This is not the situation here.

In the Buchalter case the conduct of the prosecuting attorney was not such as to constitute denial of due process because of the provocation involved. Ordinarily, remarks of counsel do not constitute a federal question but where the remarks are of such a nature and so persistent and so calculated as to affect the fairness of the trial, then they must amount to a denial of due process. Because of this distinction it is deemed necessary to discuss to some extent the merits of this case.

It has been said that "radical fault in the trial of a crime involving the liberty of the defendant will be noticed and corrected by the reviewing court, although there be no proper objection, exception, or assignment. *Shuy vs. United States,* 261 Fed. 316 at 320 (C.C.A.). In this case, at page 319, the court quotes the prejudicial argument of the prosecuting attorney which was held to be prejudicial by the trial court. The court said, at 320:

> "The contention that proper objections were not made and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince. (Citation of cases). And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment."

The cause was reversed because of this *one* prejudicial statement of the prosecuting attorney.

The case of *Latham vs. United States,* 226 Fed. 420 at 423-4-5 is also authority for the argument contained in paragraph III of this argument. Based upon the right of review in this case in an appellate court, none of whose members were disqualified to sit and determine the issue involved. The court said P. 424:

> "The right of a citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceedings, be that participation great or small. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unqualified, it was unlawful."

In the case cited the district attorney, in his closing argument, stated that had the train not been three hours late he would have had another witness who would have testified that he had also been defrauded. Defendant's counsel objected. The objection was sustained and the jury

cautioned not to consider the statement of counsel. In spite of the unbroken line of authorities that when the court stops counsel and cautions the jury the violation of defendant's right to a trial and verdict on the testimony of witnesses and not on statement of counsel is not violated. This case was reversed because of such remarks. The court, in referring to this rule, said:

> "Everyone must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly tried to ignore that impression, it still enters into and forms a part of the verdict."

In the New Hampshire case cited on page 425 the court has this to say:

> "It is unreasonable to believe the jury will utterly disregard them (remarks of counsel). They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be more or less, according to the character of the counsel, his skill and adroitness in argument and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, * * *."

At the time of the trial of petitioner's case the special prosecuting attorney had achieved very great publicity in the State of Michigan based on his grand jury trials and because of the resultant publicity he was elected Governor of Michigan in 1946.

The court in the Latham case goes on to say:

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the Government of the United

States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to testimony of the witnesses, in order that no right of the defendant is violated."

It is impossible to recapture the manner and tone and the insulting demeanor of the special prosecutor on the printed page. The effect of his remarks and his disparagement of counsel must have, under the circumstances, greatly influenced the jury. Many times no ruling was made by the trial court on objections to these remarks but, under the circumstances, we believe that they were of such a nature that cautionary instructions to the jury, even if given in all cases, would have been of little avail. Counsel sincerely believes that if, at the time of the hearing of this case in the Supreme Court of Michigan, the special prosecuting attorney had been a county prosecutor or an ex-special prosecutor for the County of Ingham, instead of being Governor, he would have been severely criticised by the court and this case would have been reversed because of his misconduct.

In *Read vs. United States,* 42 Fed. (2d) 636 (C.C.A.) at 645 the court refers to part of the argument of the district attorney and cites *N.Y.C.R.R. vs. Johnson,* 279 U. S. 310, 318; 49 Sup. Ct. Rpr. 300, 303; 73 L. Ed. 706. In reversing the judgment because of the argument of counsel the court said:

"The state, whose interests it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suiters in their right

to a verdict, uninfluenced by the appeals of counsel to passion or prejudice."

The court said, in commenting on this case:

"This was a civil action, and it is much more important that prejudice be not aroused in a criminal action than it is in a civil one. No exceptions were taken to the remarks of the prosecuting attorney, but, as held in the N.Y.C.R.R. Company case, supra, where paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error."

This court in *Van Gorder vs. United States,* 21 Fed. (2d) 931, 942 said on this subject:

" 'In criminal cases involving the life or liberty of accused appellate courts of the United States may notice and correct, in the interest of just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the defendant's rights although those errors were not challenged or reversed by objections, motions, exceptions, or assignments of error'."

In *August vs. United States,* (C.C.A.) 257 Fed. 388 at 391 the cause was reversed because of prejudicial argument and statements of counsel:

"There were no exceptions taken at the trial to the remarks of counsel, and it has been the uniform ruling of this court that such exceptions are necessary in order for this court to review the error if any." (Citation of cases).

The court held that under the amendment to the Judicial Code, which is as follows: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which

do not affect a substantial right of the parties.", that it would render judgment without regard to the technical error of the want of exceptions to the remarks of counsel.

The prosecutor, in his argument to the jury, referred in an inflammatory manner to World War I. The case was tried in 1918. The court held that it was not necessary to inflame the passions of jurors by talking about the enemies of our country. The court said:

> "The language used speaks for itself. It must have produced a situation in the minds of the jurors that disregarded a calm consideration of the rights of the defendant. The United States can not afford to convict her citizens in this manner."

Nor can the State of Michigan afford to convict its citizens in the manner in which petitioner was convicted and his conviction affirmed. Political careers have been built in the past upon the successful prosecution of citizens charged with wrongdoing. Everyone connected with the People's side of this case has been promoted politically. The special prosecutor is now governor, Leland W. Carr and John Dethmers are now Justices of the Supreme Court. The prosecuting attorney, Mr. Anderson, and Mr. Warner, the assistant to the special prosecutor are now assistants attorney general. The right of a citizen to a fair trial and to a fair review of that trial in an appellate court is of much greater consequence than the election to public office of any official of the grand jury.

V.

The petitioner was prosecuted for an alleged crime not known to the common law and not defined by statute. He was, therefore, denied due process of law.

The "Wharton Rule" has been adopted by the courts of the United States and of every state where the question has been raised. Under this rule there can be no conspiracy to commit a crime where a concert of action and plurality of agents are necessary elements of the substan-

tive offense for the commission of which a conspiracy is alleged to have been formed. It is claimed in this case that the conspiracy charged was a "conspiracy to corrupt the legislature". No such conspiracy was charged. The conspiracy charged in the warrant and information was that certain persons unlawfully confederated to give and receive bribes to effect the passage of a certain bill through the legislature of the State of Michigan. It has been held in many cases that this rule applies to cases of bribery as well as others where a concert of action is required. This rule was upheld in *United States vs. Dietrich*, 126 Fed. 664; *United States vs. Sager*, 49 Fed. (2d) 725; *United States vs. N.Y.C.C.R. Co.*, 146 Fed. 298, and these holdings were cited with approval in *United States vs. Katz*, 271 U. S. 354; 46 Sup. Ct. Rpr. 513; 70 L. Ed. 986, citing *United States vs. Burke*, 221 Fed. 1014; *A. Guckenheimer & Bros. Co. vs. United States*, 3 Fed. (2d) 786; *Vannata vs. United States*, 289 Fed. 424; and in the State courts *People vs. Wettengel, et al.*, 104 A.L.R. 1423 (Col.). This court held that where a concerted action of the giver and the taker is essential to constitute the crime of bribery an indictment will not lie for conspiracy to commit bribery if the conspiracy is charged to have included both the prospective giver and the prospective receiver thereof and several persons are involved as prospective givers in the alleged conspiracy. In an exhaustive note beginning on page 1430 the author lists recent decisions recognizing this doctrine consisting of the courts of the United States, California, Colorado, Pennsylvania and many others. Also *State of Iowa vs. Jose T. Law*, 11 A.L.R. 194; 79 N. W. 145 (Iowa).

This doctrine was also recognized in *United States vs. Gebardi*, 287 U. S. 112; 53 Sup. Ct. Rpr. 35 at 37; 77 L. Ed. 206; *Funck vs. Farmers Elevator Co.*, 142 Ia. 621, and many others.

This rule has become a part of the common law of the United States. Although this question was raised by petitioner seven times the Supreme Court of Michigan has avoided ruling upon the same. To rule on this question would require a reversal of this case. Otherwise the State of Michigan would be standing alone in its repudia-

tion of the Wharton Rule. We were entitled to have this question passed upon.

In *Grayson, et al. vs. Harris, et al.*, 267 U. S. 352; 45 Sup. Ct. Rpr. 317; 69 L. Ed. 652, reversing *Harris vs. Grayson*, 216 P. 446; 90 Okl. 147, the court held as follows:

> "Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court, but was not." (Citation of cases).

There is no law "creating or defining the offense" sought to be charged. 16 Corpus Juris Secundum, pg. 1171, supra.

> "Due process requires a law creating and defining offense charged and accusation in due form to sustain conviction." *Levine vs. State* (N. J.) 166 A. 300, 302. Citing Amend. 14, Sec. 1, U. S. Constitution.

The conspiracy charged was neither a common law conspiracy nor was it a statutory conspiracy. There is no such common law conspiracy as "corrupting the legislature". Furthermore, petitioner was not charged with any such conspiracy, as a reading of the warrant and information will disclose.

We submit that the writ should issue.

Respectfully submitted,

FRANK L. BLACKMAN,
Attorney for Petitioner.

BLACKMAN & BLACKMAN,
Of Counsel.
All of Jackson, Michigan.

APPENDIX

I.

The Biennial Report of the Attorney General of Michigan for the biennial period ending June 30, 1946, John R. Dethmers, Attorney General, page 754, under heading: "Michigan Supreme Court cases pending — Criminal. People vs. Carl F. DeLano, et al."

Under the heading "Attorney General Department Personnell, John R. Dethmers, Attorney General; Foss O. Eldred, Deputy Attorney General; Edmond E. Shepherd, Solicitor General."

APPENDIX

II.

WARRANT

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

STATE OF MICHIGAN
SS
COUNTY OF INGHAM

TO THE SHERIFF OF INGHAM COUNTY, ANY MEMBER OF THE MICHIGAN STATE POLICE, AND ALL POLICE OFFICERS IN THE STATE OF MICHIGAN.

GREETING:

Whereas, upon an inquiry conducted under and in pursuance of Sections 17217 and 17218, and all sections of the Compiled Laws of Michigan for the year 1929, as amended, relative to the inquiries provided for under said sections of the Compiled Laws of 1929, before me LELAND W. CARR, one of the Judges of the Circuit Court

for the County of Ingham in the matter entitled: "IN THE MATTER OF THE COMPLAINT OF HERBERT J. RUSHTON, ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, FOR A JUDICIAL INVESTIGATION CONCERNING CERTAIN CRIMINAL OFFENSES" there appears to me to be probable cause to suspect that heretofore, to-wit, on the 1st day of January A. D. 1939, and on divers other days and times between that time and the 1st day of July, A. D. 1939, in the County of Ingham and State of Michigan aforesaid, MIHKEL SHERMAN, MAX ROSENFELD, PAUL FAULKNER, ERNEST W. ALDEN, HARRY E. McKINNEY, CLAYTON R. McKINNEY, MARTIN W. HILDEBRAND, GUNNAR W. WIKANDER, CARL DeLANO, CHESTER M. HOWELL, EDWARD J. WALSH, WILLIAM BUCKLEY and FRANCIS NOWAK, did unlawfully and wickedly agree, combine, conspire, confederate and engage to, with and among themselves, and to and with each other, and to and with certain members of the legislature, and to and with divers other persons to me unknown, wilfully and corruptly to affect and influence the action of the Legislature of the State of Michigan, the Senate, the House of Representatives, and divers members thereof, in the consideration of and action on certain proposed legislative measures then and there pending in and before said Legislature, Senate and House of Representatives, to-wit: SENATE BILL NO. 269, being "A bill to provide for appointment of a board of examiners in naturopathy, and for the examination, regulation, licensing and registration of practitioners of naturopathy, and for the punishment of offenders against this act," and divers other measures and bills then and there pending in and before said legislature, the Senate and the House of Representatives, by then and there offering, tendering, promising, giving and receiving of bribes, money, and other things of value; and by promises to accept and receive such bribes, money, and other things of value; and by promises to accept and receive such bribes, money, and other things of value; and by the actual giving and receiving of the same, they, the said Carl DeLano and Chester M. Howell, being then and

there duly elected, qualified and acting members of the Senate of the State of Michigan; and Edward J. Walsh, William Buckley and Francis Nowak, being then and there duly elected, qualified and acting members of the House of Representatives of the State of Michigan; and it being then and there the duty of said members of the said Senate and of the House of Representatives to refrain from the acceptance of the promises of bribes, money, or other things of value, made, offered, or given for the purpose or with the intent of influencing such members in the performance of their official duties and particularly in the consideration of and action on bills and proposed legislation pending before such legislature, Senate and House of Representatives, and they, the said Mihkel Sherman, Max Rosenfeld, Paul Faulkner, Ernest W. Alden, Harry E. McKinney, Clayton R. McKinney, Martin W. Hildebrand and Gunnar W. Wikander, being then and there interested in the proposed legislative measures aforesaid, and in other measures then and there pending before said legislature, Senate and House of Representatives, and it being then and there their duty to refrain from the making of promises, the offering, tendering or giving of bribes, money, or other things of value whatsoever to the members of said Senate and House of Representatives, or to any one of such members for the purpose and with the intent of influencing said members of the Senate or the House of Representatives of the State of Michigan, or any of them, in the performance of the official duties of such members, and particularly in the consideration of and action on the proposed legislative measures aforesaid, or any bill or proposed legislation pending in and before said legislature, Senate and House of Representatives, nevertheless well knowing their respective duties aforesaid, said defendants, and all of them, did corruptly, dishonestly, fraudulently, and illegally engage and participate in said conspiracy, and confederate as aforesaid in violation of the public interest of the PEOPLE of the STATE OF MICHIGAN, to the jeopardy of the public peace, safety, dignity and welfare of said State and the People thereof. THEREFORE: In the name of the People of the State of Michigan, you,

and each of you, are commanded forthwith to arrest the said Mihkel Sherman, Max Rosenfeld, Paul Faulkner, Ernest W. Alden, Harry E. McKinney, Clayton R. McKinney, Martin W. Hildebrand, Gunnar W. Wikander, Carl DeLano, Chester M. Howell, Edward J. Walsh, William Buckley and Francis Nowak, and bring them before me to be dealt with according to law. Given under my hand and seal of said Court at the City of Lansing, County of Ingham, on the 6th day of December, A. D. 1944. Leland W. Carr, Circuit Judge acting under Sections 17217 and 17218 Compiled Laws of the State of Michigan for the year 1929 and acts amendatory thereto.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 623

CARL F. DELANO,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

REPLY TO BRIEF OPPOSING PETITION FOR CERTIORARI

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Jackson, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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IN THE

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REPLY TO BRIEF OPPOSING PETITION FOR CERTIORARI

REPLY TO COUNTER-STATEMENT OF THE CASE

(Figures in parentheses refer to pages of the record as printed for the court below unless context clearly indicates otherwise)

In the counterstatement prepared by the solicitor general of the State of Michigan several matters are stated in paragraphs 1 to 8, pages 4 to 10. This counterstatement is made up almost entirely of assumptions, conclusions and matters which are not contained in the record. He says that Attorney General Rushton had withdrawn from the grand jury investigation, that the warrant for petitioner's arrest was issued on recommendation of the special prosecuting attorney who was appointed in the latter's place and stead and that thereafter the department of the attorney general took no part in the prosecution of the case nor was it consulted therein, that the attorney general had no connection with the matter until subsequent to the first of January, 1947. He says that the "precise truth" is that Justice Dethmers had nothing to do with the case during his entire term of office as attorney general. There

is not a scrap of evidence of any kind in the record to support these assertions.

As to the claim that no federal question was presented to the court below we stand on the record.

In paragraph 4 he says that although the circuit judge who conducted the investigation and issued the warrant, presided as examining magistrate and later heard petitioner's motion to quash and motion for separate trial, that petitioner did not challenge the qualification of the circuit judge or file an affidavit of prejudice.

An affidavit of prejudice is necessary in Michigan only in a very limited sense. The statute, Sec. 27.466, *Michigan Statutes Annotated, Compiled Laws for 1929*, Sec. 13888, provides that written objection on account of disqualification is only necessary where the judge is related within the third degree of consanguinity to either of the attorneys or either party to said cause. (Foot Note 1). This statute has been construed in *Equitable Trust Company vs. Fisher*, 301 Mich. 77, in which the court held, citing *Hall vs. Thayer*, 105 Mass. 219, that,

> " 'The right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit', rests upon a principle so obviously just, and so necessary for the protection of the citizen against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth."

The court also said that citizens have the right

> "to have their rights heard and determined by an impartial tribunal, free from bias, prejudice and interest, * * *."
>
> "It is a principle so elementary in nature that the application thereof is not open to confession."

In *Horton vs. Howard*, 79 Mich. 642, the court below held,

(See Foot Note 1 in Appendix).

> "No judge can sit in his own cause. Should he do so, a decree rendered by him in his own favor would be utterly void. *If he can not sit, his seat in a judicial sense is vacant and his acts are without judicial sanction.*"

The acts of a judge who is disqualified are utterly void. See *Kennedy vs. State,* 142 S. E. (Ga.) 751.

> "From whatever source the disqualification to preside in a case may arise, the effect when such disqualification exists, is to divest jurisdiction and the action taken is coram non judice, and void."

In this case the justice sitting had been the solicitor general during the pendency of the case in question.
See *State vs. Martin,* 256 Pac. 681.

It is clear from the examination of the Michigan Statute Sec. 13888 of the Compiled Laws of Michigan for 1929 that all grounds for disqualification stated therein, except that of third degree of consanguinity to the attorneys, is jurisdictional and can not be waived. The statute specifically provides that the objection to relationship within the third degree of consanguinity may be waived by stipulation and shall be deemed to have been waived unless a written objection on account of such disqualification is filed. No waiver is provided for for any other ground of disqualification. Therefore, the disqualification being jurisdictional it follows that it could not be waived, hence no formal or other objection is necessary and the act of any judge under such disqualification is void and may be collaterally attacted or raised for the first time upon appeal.

In the same paragraph he says "The record does not include the transcript of the preliminary examination; the question was not raised on motion to quash". In this counsel is in error. The transcript of the testimony taken at the examination is found beginning on page 14 of the record under a separate heading. (Foot Note 2). The testimony continues to and including page 248 which is a

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(See Foot Note 2 in Appendix).

sizable portion of a record of 891 pages. This question was not abandoned in defendant's and petitioner's brief. It was raised on page 24 thereof, it being claimed that the arrest, arraignment, trial, conviction and sentence of the respondent was in violation of the Fourteenth Amendment to the Constitution of the United States in that the petitioner had been deprived of liberty and property without due process of law and that he had been denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Counsel for petitioner does not believe that it is necessary, in order to raise a federal question, that the question be specifically so designated but that it is enough if the assignment itself raises a federal question as in this case.

Replying to paragraph 6 on page 7 petitioner says that he was charged with a conspiracy to pass a certain bill through the legislature of the State of Michigan by means of bribery and that he was tried on such a charge and convicted. That subsequently the charge was changed by the phraseology of the courts and the special prosecutor and now the solicitor general to a "conspiracy to corrupt the legislature".

Further that the court below affirmed petitioner's conviction of that offense and not of the offense charged and of which he was convicted.

This court said in *Cole vs. State of Arkansas,* 68 Sup. Ct. Rpr. 517,

> "No principle of procedural due process is more clearly established and that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Citing In Re Oliver, 332 U. S. ; 68 Sup. Ct. 499, a recent case from Michigan.

In the case cited the respondents had been convicted of one offense and sentenced upon another which sentence was affirmed by the Supreme Court of the State of Arkansas.

The court held that "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law — safeguards essential to liberty in a government dedicated to justice under law".

He says, at the bottom of page 8, that he will show that Mr. Justice Dethmers, while attorney general, had absolutely nothing to do with the case and sets forth what he claims are facts. We do not claim that he ever personally intervened and we think it immaterial that his name does not appear on the record. We note that counsel for the state attempts to explain why this case is listed in the biennial report of the attorney general and excuses it by saying that neither he, the attorney general, nor the solicitor general had participated.

All of the matters stated on page 10, while they may be true, are not contained in the record and petitioner's counsel has no knowledge of the truth of such statements except that he admits that oral arguments were heard in June of 1947.

In paragraph 8 on page 10 he attempts to create the impression that although the attorney general possesses the power of supervision over prosecuting attorneys and may intervene in the trial of a criminal case; that in the Supreme Court the solicitor general has charge of state cases but neglects to state the fact that he is a member of the attorney general's staff.

In 27 Michigan State Bar Journal 27 a laudatory article concerning the solicitor general is published. (Foot Note 3). It will be noticed that the solicitor general, under the direction of the attorney general, has charge of causes in the Supreme Court of Michigan.

Under the constitution of the State of Michigan as set forth on page 19 of the Petition for Writ of Certiorari the attorney general has power to prosecute and defend all actions in the Supreme Court in which the state shall be interested or a party, he may intervene and appear for the people of the state "in any cause or matter, civil or

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(See Foot Note 3 in Appendix).

criminal, in which the people of this state may be a party in interest". The statute provides that he shall have general supervision over all prosecuting attorneys. This statute goes back to 1846 and in 1939 by Act No. 248 of Michigan Public Acts of 1939, Section 35 (Foot Note 4) the attorney general was authorized to appoint such assistant attorneys general as he might deem necessary and that he might designate one of his assistants to act in his behalf on certain boards and commissions and to appear for the State of Michigan in any suit or action before any court or administrative body or before *any grand jury* with the same powers and duties and in like cases as the attorney general but at all times be subject to the *orders and directions of the attorney general and to hold office during his pleasure.*

At the same session of the legislature the office of solicitor general was created by Act No. 144 of the Public Acts of 1939, Section 28. (Foot Note 5). By this section the attorney general was authorized to designate one of his assistant attorney generals to be known as solicitor general who, under his direction, should have charge of cases in the Supreme Court (criminal) and providing that the attorney general *shall,* upon the request of the Governor or either branch of the legislature, and *may,* when in his judgment the interests of the state require it, intervene in any matter, civil or criminal, in which the state may be a party or interested.

From the above and the matters contained in the foot notes it is crystal clear that the solicitor general is a member of the attorney general's staff and acts at his pleasure and in his stead. From the whole of the record it is clear that under the powers conferred upon the attorney general by the constitution and the various statutes cited, the attorney general, either by himself or by the solicitor general or by any other assistant attorney general, had the power to intervene in the grand jury proceedings in question and to take over the trial of the case in question. He was at

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(See Foot Note 4 in Appendix).

(See Foot Note 5 in Appendix).

all times chief prosecuting officer of the State of Michigan and whether he exercised the powers inherent in his office is of no consequence. The fact that he held the office of attorney general during the time this case was tried in the Circuit Court for the County of Ingham and for some time thereafter during which it was appealed to the Supreme Court, clearly disqualified him from participating therein after he became a Justice of the Supreme Court of Michigan.

In the case of *Shannon vs. Smith*, 31 Mich. 450, the lower court held that a judge who had been consulted or employed as counsel in the subject matter to be litigated was disqualified to act therein and set aside as void an order made by a judge laboring under such a disqualification, transferring the cause to another circuit because of such disqualification.

In *People vs. Crappa*, 238 Pac. 731 (Cal.) the California Supreme Court held that one who had acted as district attorney in a prosecution was disqualified to act as trial judge.

REPLY TO ARGUMENT

In paragraph 1, page 12, the solicitor general again complains of the omission from the record of the transcript of the preliminary examination. He says "petitioner did not see fit, in settling his bill of exceptions, to include a transcript of the preliminary examination or the magistrate's return; there is a gap in the printed record between the warrant (7-10) and the information (11). Had he intended to stress the point now emphasized, he should have done this. There is, therefore, no record of any protest the petitioner may have made during the preliminary examination." Had the solicitor general looked in the index to the record or examined the record for four more pages he would have found the transcript of the testimony which has been hereinbefore referred to, beginning on page 14. Therefore there is a record of the protest made by the petitioner and the record is complete in every particular.

The second allegation on page 12 that the petitioner did not object to the grand juror, examining magistrate and circuit judge, Hon. Leland W. Carr, presiding at the examination or passing upon his motion to quash and motion for separate trial, we have already pointed out that no objection is necessary in the State of Michigan and that the fact that the judge did so act, although disqualified, divested him of jurisdiction. No affidavit of prejudice is necessary in the State of Michigan and the question may be raised for the first time upon appeal. It was not abandoned.

REPLY TO POINT TWO

Replying to point 2 on page 13 they quote from petitioner's brief, pages 18 and 19, and say that counsel for petitioner are misinformed or mistaken as to the facts when they made the quoted statement. Every single word in the quoted statement is true according to the record in this cause and whether the attorney general took any part in the prosecution of petitioner or was consulted is of no consequence. He says that it was not until January, 1947 that the solicitor general assumed charge of the case on appeal. There is no proof of this in the record. As to whether Judge Carr participated in a motion for rehearing we have no knowledge. We relied upon the certified copy of the order denying the rehearing as certified to the Supreme Court of the United States.

We note in the State's brief that a corrected certified copy of this entry has been filed. We do not have any knowledge of any such occurrence.

REPLY TO POINT THREE

Point 3 on page 15 deals with the remarks made by the special prosecutor. This subject has been argued in petitioner's brief and a few of the remarks set forth therein. The solicitor general has seen fit to quote others. The quoted remarks are only a few of the 112 remarks which were the subject of Assignments of Error.

Counsel for petitioner has made an exhaustive search of the authorities on this subject and do not find anywhere where any prosecuting attorney has been guilty of such conduct as the special prosecutor was guilty of in this case.

In the State of Michigan, and in most other jurisdictions, it is reversible error for the prosecuting attorney to comment upon the failure of a defendant in a criminal case to take the stand in his own behalf. No such comment was made in this case but it is just as improper to refer to it now in these proceedings. See page 7, note 8, of State's brief. It is true that the petitioner did not take the stand. His reasons for not taking the stand are well known to counsel for petitioner. These reasons have ceased to exist and if he is granted a new trial he will take the stand if he is physically and mentally able to do so.

The contents of note 8 above referred to is indicative of the whole attitude of the special prosecutor, of the solicitor general and of the Supreme Court of the State of Michigan, that petitioner did not take the witness stand, therefore, he was guilty and being guilty it does not matter whether his constitutional rights are observed or not. We need not point out the fallacy of such a position.

REPLY TO POINT FOUR

Answering point 4, page 25, petitioner's counsel state that they have covered this subject in their brief and petition for certiorari.

Answering the State's brief generally petitioner calls attention to the last paragraph on page 24 in which the solicitor general says that it is unfair "for defense counsel to await conviction in a criminal case and then, for the first time, comb the cold record for any remarks of the prosecuting officer which might be urged as error or as denial of due process; *it is not fair to* the trial judge."

The trial judge had plenty of opportunity to correct the situation which arose in this case because of the vicious remarks of the special prosecutor. Nearly all of them were objected to but not once was the special prosecutor admonished by the court nor was he ever held within reasonable bounds in his remarks. Further than that the trial court had an opportunity to correct this situation as the same was raised in a motion for a new trial filed by petitioner (R. 878, Vol. 2) paragraph four of said motion dealing wholly and particularly with the prejudicial remarks of the special prosecutor. This motion was denied.

The court's attention is called to the fact that in the official report of this case, 318 Mich. 557, the attorney for the People are listed as follows: Eugene F. Black, Attorney General, Edmund E. Shepherd, Solicitor General, H. H. Warner and Victor S. Anderson, Assistant Attorneys General and Richard B. Foster, Special Assistant Prosecuting Attorney, for the People. It would seem as though the attorney general's office was fairly well represented in this cause.

Counsel refers in note 7, page 6, to Michigan Court Rule 67, Sec. 1, which required that the appellant shall concisely, and without repetition, state the questions involved. The rule formerly required all of these questions to be stated on one page. It is now permissible to use more than one page but they must be very brief.

On page 12 he seems to confuse the "Assignments of Error" with the "Statement of Questions Involved". It

is not necessary that each Assignment of Error be set out specifically in the Statement of Questions Involved. In this cause the Assignments of Error cover 73 pages (R. 802 to 875 inc.)

Counsel for the State, on page 17 of his brief, says that the "statements of the prosecuting officer, in the majority of instances, were made without objection by defense counsel, and no judicial ruling was requested or obtained; * * *." This is not true. A great many of the statements were objected to by counsel. It is true that on several of them rulings were not obtained but that is no fault of counsel.

He says further "indeed, in most of them, argument between opposing counsel was carried forward by the defense on the same plane of repartee". This is untrue. The record does not show that at any time the defendant attorneys carried on "repartee" with the special prosecutor. The defense counsel conducted themselves in a gentlemanly manner throughout the trial. The remarks of the special prosecutor were entirely unprovoked, unnecessary and uncalled for. Never, at any time during the trial, was there any humorous exchanges between counsel for the defense and the special prosecutor. From the very beginning counsel for the defense felt that they were being imposed upon by the special prosecutor and that their clients were being prejudiced by such conduct. There was no good feeling, only bitterness, between the counsel for the defense and the special prosecutor.

CONCLUSION

We, therefore, respectfully submit that certiorari should issue in this cause to the Supreme Court of Michigan and that the said cause be reversed and the petitioner discharged or that he be granted a new trial.

Respectfully submitted,

FRANK L. BLACKMAN,
Attorney for Petitioner.

BLACKMAN AND BLACKMAN,
Of Counsel.

APPENDIX

Foot Note 1--

Compiled Laws of Michigan for 1929, Sec. 13888. No judge of any court shall sit as such in any cause or proceeding in which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties; nor shall any judge decide, or take part in the decision of any question which shall have been argued in the court, when he was not present and sitting therein as a judge. Nor shall any judge sit as a court in any cause in which he is related within the third (3rd) degree of consanguinity to either of the attorneys or counselors of either party to said cause: Provided, That such last mentioned disqualification be made to appear and that it may be waived by stipulation filed in the cause; and it shall be deemed to have been waived unless the objection on account if such qualification (disqualification) shall have been filed in writing at or before the commencement of the trial or hearing.

Foot Note 2—

Testimony taken and proceedings had at hearing on examination in the above entitled cause, before the Hon. Leland W. Carr, sitting as the examining magistrate, beginning at 10:35 A. M. Tuesday, January 9, 1945.

Foot Note 3—

THE SOLICITOR GENERAL by DANIEL J. O'HARA, Assistant Attorney General.

Edmund E. Shepherd, whose photograph appears on this month's cover, has been Solicitor General of Michigan since the creation of that office in 1939. The revised statutes of 1846 then provided among other things that the Attorney General should prosecute and defend all actions in the Supreme Court in which the State should be interested or a prty, but the legislature nine years ago amended such provisions to permit the Attorney General, in his discretion, to designate one of his assistants to be known as the Solicitor General, and who, under his direction, would have charge of such cases in the Supreme Court.

Foot Note 4—

Act No. 248 of Michigan Public Acts of 1939. Sec. 35. The attorney general shall receive an annual salary of $5000.00, payable as provided by law, and his actual necessary expenses. In addition to a deputy provided by law, the attorney general may appoint such assistant attorneys general as he may deem necessary, and who when appointed to such office shall take and subscribe the constitutional oath of office. Any such assistant attorney general may, when designated thereto by his principal, serve in the place of the attorney general as a member of the public debt commission created by act number 13, public acts of 1932, extra session, and on any other board or commission of which the attorney general is now or may hereafter be an ex officio member, appear for the state in any suit or action before any court or administrative body, or before any grand jury, with the same powers and duties and in like cases as the attorney general, but shall at all times be subject to the orders and directions of the attorney general. Such assistants shall hold office at the pleasure of the attorney general. Effective June 15, 1939.

Foot Note 5—

Act No. 144 of Michigan Public Acts of 1939. Sec. 28. The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall be interested, or a party; he may, in his discretion, designate one of the assistant attorneys general to be known as the solicitor general, who, under his direction, shall have charge of such cases in the supreme court and shall perform such other duties as may be assigned to him; and the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested. Effective May 26, 1939.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 623

CARL F. DELANO,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

REPLY TO RESPONDENT'S REJOINDER TO PETITIONER'S REPLY BRIEF

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

IN THE

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On page two of the State's rejoinder, counsel cites decisions of the Michigan Supreme Court to the effect that the judge presiding at the preliminary examination might act as trial judge. Counsel for petitioner was informed as to these cases but was not concerned with the rule thereby established in Michigan for the reason that said rule has long been at variance with the provisions of Sec. 1 of the 14th Amendment to the U. S. Constitution.

The other point raised is that the question of the participation of Mr. Justice Dethmers in the decision in this case in the court below was not raised in the motion for re-hearing.

This case was decided by the court below on Oct. 13th, 1947. A copy of the opinion of the court was received

by counsel on Oct. 14th, 1947. This copy contained only the name of Mr. Justice Sharpe, who wrote the opinion — and not the names of the participating justices.

Michigan Court Rule 71 requires that the papers upon which a motion for re-hearing is based, shall be printed and filed in the Supreme Court of this State within 20 days of the filing of the opinion therein. The motion for re-hearing in this case was filed on Oct. 24, 1947, and was denied on Dec. 3rd, 1947.

The official report of this case in the court below was first published in the official advance sheets on November 13th, 1947 — 20 days after the motion had been filed, and after the time had elapsed for the filing of a new motion under the provisions of court rule 71.

Petitioner's counsel was not required to anticipate the violation of petitioner's constitutional rights by the court below. This question was raised at the earliest possible moment, in the petition for certiorari.

Counsel for petitioner has the copy of the opinion received by him from the court below; also the official advance sheet containing the opinion; which he requests permission to file in this court.

Respectfully submitted,

FRANK L. BLACKMAN,
Attorney for Petitioner.

BLACKMAN AND BLACKMAN,
Of Counsel.

In the

Supreme Court of the United States

October Term 1947

No. 623

CARL F. DELANO, Petitioner

v.

STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

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Daniel J. O'Hara
Assistants Attorney General

FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN

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October Term 1947

No. 623

CARL F. DELANO, Petitioner

v.

STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

I

Opinion of Court Below.[*]

The opinion (897) of the court below is officially reported as *People v. Delano,* 318 Mich. 557.

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[*]

Unless otherwise plainly indicated, numbers in parentheses throughout this brief refer to pages of the printed record.

II

Counter-Statement on Jurisdiction.

Petitioner invokes the jurisdiction of this Court under § 237 of the Judicial Code as amended, Title 28 U.S.C., § 344 (b), and Supreme Court Rule 38; and he claims that substantial federal questions were timely raised in the court of original jurisdiction and again on review in the Supreme Court of the State of Michigan.

It is our position: (1) that certain questions presented to this Court in the petition, and in the brief of the petitioner, were never raised in the court below in any aspect whatsoever, state or federal;[1] (2) that the court below decided no federal questions, substantial or otherwise; (3) that in the court below the petitioner did not clearly, plainly and specifically set up any claim that his right to due process, guaranteed by the Fourteenth Amendment, had been violated; (4) that if such a claim appears in motions

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[1]

Immediate reference is had to the 4th question stated in the petition for certiorari, p. 8, wherein for the first time petitioner challenges the qualification of a Justice of the Michigan Supreme Court to participate in the review of this cause. There is absolutely no ground for such a contention, and the question was not raised in the court below by affidavit of prejudice or on motion for rehearing (916), or in any other manner. A similar attack, likewise unfounded, is made upon the good faith of another member of the same court when petitioner intimates, p. 21, that the Chief Justice who as circuit judge had issued the warrant for petitioner's arrest, participated in the denial of his motion for rehearing. Counsel's misapprehension is based upon a mistake in the printing of the order of such denial (945); the name of the Chief Justice was stricken in the journal entry as appears from a corrected copy forwarded by the clerk.

addressed to the trial court, [2] it is couched in vague and general terms; (5) that if such a claim was included in any of petitioner's assignments of error (802-872, at 803) it was cloaked in general terms, and it was abandoned upon failure to present any specific, special federal question in petitioner's brief;[3] and (6) that if such a claim was made in petitioner's brief, it was obscurely set forth in his statement of facts—again in general terms and without specification.

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[2]

See motion to quash (872-875); motion for separate trial (875-877); and motion for new trial (878-881).

[3]

The rule in Michigan is that where a question is not briefed it will be considered abandoned. Likewise an assignment of error: People v. Thompson, 221 Mich. 621; People v. Harter, 244 Mich. 346; People v. Bark, 251 Mich. 228; People v. Reading, 307 Mich. 616. Cf. People v. Smith, 260 Mich. 486. Mich. Court Rule 67, par. 1.

III

Counter-Statement of the Case.

We deem it necessary to correct the following inaccuracies and omissions in the petitioner's statement of the matter involved:[4]

1. It is said, p. 2, that the grand jury proceedings out of which emerged the warrant issued in this cause, 'were commenced on complaint of Herbert J. Rushton, Attorney General for the State of Michigan'; and, on p. 20, that 'the reason for the disqualification of Judge (Mr. Justice) Dethmers is more apparent because the proceedings for the . . . grand jury was instituted by his predecessor in office, the Honorable Herbert J. Rushton'.

We hasten to add that long before the warrant was issued, Attorney General Rushton had withdrawn from the grand jury investigation; that the warrant for petitioner's arrest was issued on recommendation of the special prosecuting attorney who was appointed in the latter's place and stead; that thereafter the department of the Attorney General took no part in the prosecution of this cause, nor was it consulted therein; and that the Attorney General had no connection with the matter until subsequent to the 1st day of January 1947, four months after Attorney General Dethmers had taken his oath of office as Justice of the Michigan Supreme Court. The precise truth of the matter is that Mr. Dethmers had nothing whatsoever to do with the case during his entire term of office as Attorney General.

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[4] Supreme Court Rule 27, par. 4.

2. Petitioner states, on p. 2, that the special prosecuting attoney who tried the cause for the State, is now Governor of Michigan;[4] on page 6, that the circuit judge who issued the warrant for petitioner's arrest on the charge of conspiracy to corrupt the legislature of the State, is now a member of the Michigan Supreme Court;[5] and that the Attorney General who was in office during the pendency of this cause in the circuit court and later on appeal in the Supreme Court, was appointed Justice of Michigan's highest court late in 1946.[6]

3. While it is true that petitioner's motion to quash (872) the information was based in part on the ground, vaguely asserted without specifications, that the prosecution was in violation of the due process clause of the Fourteenth Amendment (873), and although such a general statement is found in his 8th assignment of error (803-804), no federal question was stated in petitioner's brief on file in the

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[4]

The wholly unjustified insinuation throughout the petition and brief is that the Governor of Michigan attained his high position by disregarding the constitutional rights of persons accused of corrupting the legislature of this State. Nothing could be further from the truth.

[5]

This Justice, however took no part in the proceedings on appeal, and did not participate (as counsel intimates) in denial of petitioner's motion for rehearing.

[6]

We repeat: the Attorney General who was in office during the trial of this cause, had nothing whatsoever to do with the matter then or at any other stage of the proceedings.

Michigan Supreme Court, as required by rule,[7] nor was a federal question presented to or decided by the court below.

4. Although the circuit judge who conducted the investigation and issued the warrant, presided as examining magistrate and later heard and denied petitioner's motion to quash (872) and motion for a separate trial, the petitioner never filed an affidavit of prejudice, and the record fails to disclose that he ever challenged the qualification of the circuit judge, or that he raised the question in the trial court. The record does not include the transcript of the preliminary examination; the question was not raised on motion to quash (872-875); it was not presented in the motion for a separate trial (875-877), and it was not mentioned in the motion for a new trial (878-881). It was first raised when assigned as error (803) in the court below. But it was abandoned in appellant's brief. And the court below did not decide or consider it.

5. Although petitioner averred (804) in his assignments of error that certain impromptu remarks of the prosecuting attorney 'were calculated to and did bias the jurors in consideration of the case, resulting in a miscarriage of justice', he made no special claim that by virtue of such remarks he was deprived of his liberty without due process of law, nor did he contend that any right guaranteed by the Fourteenth Amendment had been violated. And he did not brief the federal question now raised for the first time.

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[7]

Michigan Court Rule 67, § 1, requires that beginning on the first page of the brief appellant shall concisely and without repetition, 'state the questions involved in the appeal. . . Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved'.

6. It is also true, pp. 4-5, that at the conclusion of the State's proofs petitioner moved for a directed verdict (648) on the ground (here shortly state) that the charge of conspiracy set forth in the information and disclosed by the proofs, was not an offense known to the common law or to the law of Michigan. But petitioner's motion for a directed verdict asserted no federal right, alleged no denial of due process, and was based solely upon non-federal grounds. The motion was grounded on counsel's contention (again urged here) 'that there may not be a conspiracy founded upon a charge to commit bribery between persons, one charged with the intended taking, and several charged with the giving of the same bribe'. This, for some strange reason, is now said to present a federal question.

We, therefore, deem it necessary to a clear understanding of the questions involved, that we explain, in the language of the court below, and as summarily as possible, the nature of the offense committed by the petitioner, 318 Mich. at p. 567:[8]

> "In the case at bar, the common-law conspiracy charged in the people's information was broad in scope and required a number of participants. There is evidence that a group of people organized to promote a bill to legalize the practice of a profession of which they were members; they hired Williams as a lobbyist who arranged for the introduction of the bill in the senate by paying two senators the 'cost' of such legislative

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[8]

The petitioner, Senator Delano, did not take the stand to deny the testimony of competent witnesses to the effect that he had involved himself in the conspiracy charged in the information; nor did he deny the accusation in his motion for new trial; but he has chosen to rely on technicalities throughout.

process; that the group held frequent meetings, the main purpose of which was the raising of money to be expended by Williams in influencing such legislation; that defendant Sherman was active in the raising of funds for such purpose; that defendant DeLano (the petitioner here) was paid $2,000 and agreed to use such sum to influence members of the committee of the house of representatives to release the bill and thus assure its final passage.

The record contains competent evidence to sustain the charge that a conspiracy was formed for the purpose of corrupting the legislature by means of bribery. It was not necessary that DeLano and Sherman have knowledge of its inception or all of its ramifications. . . . Nor was it necessary that they know all of the conspirators . . . We conclude that the conspiracy to corrupt the legislature as charged in the warrant and information is an offense punishable under the laws of Michigan".

7. We challenge the implications of the following statement, p. 6:

"It appears from the supplement to the record filed herein that the Honorable John R. Dethmers participated in the decision affirming the conviction of petitioner although he was, at the time of said prosecution, the chief prosecuting officer of the state. It appears also from said supplement to the record that he participated in the denial of the motion for rehearing in the Supreme Court contained in said supplement".

To show that Mr. Justice Dethmers, while Attorney General, had absolutely nothing to do with this case, we set forth the following facts:

(a) As already shown, Attorney General Dethmers did not participate in the prosecution of the cause in the trial court.

(b) In the Supreme Court the following occurred:

In May 1945, petitioner filed an application for leave to appeal from the judgment of conviction.

June 4, 1945, a brief was filed by the prosecution in opposition to the application for leave to appeal; that brief was not signed by the Attorney General, but it was subscribed by the special prosecuting officer and two of his assistants. The appeal was granted on the 7th day of June 1945.

May 7, 1946, after the lapse of 11 months devoted to settlement of the bill of exceptions (in which the office of the Attorney General did not participate), the printed record was filed in the Supreme Court, but the name of the Attorney General does not appear thereon or therein.

July 1, 1946, this case was included in a list of cases then pending in the Supreme Court, in the biennial report of the Attorney General; but such a list was prepared by the secretary of the Solicitor General from the Supreme Court records. Neither the Attorney General nor his Solicitor General (in charge of such matters) had participated in the case, and inclusion in such a list is not significant.

Sept. 9, 1946, the Honorable John R. Dethmers ceased to be Attorney General upon elevation to the bench of the State Supreme Court.

Sept. 11, 1946, petitioner filed his brief in the office of the clerk of the Supreme Court and served copies on the staff of the special prosecuting attorney. If such copies were served on the department of the Attorney General, they were received in the name of Foss O. Eldred, the successor to Mr. Dethmers.

In October, 1946, the cause was listed as No. 76 for that term of court, the name of Foss O. Eldred appearing among others as Attorney General.

Jan. 1, 1947, when the present Attorney General took office, the matter was assigned to the Solicitor General and others for the preparation of a brief and argument of the cause.

It was not until June 1947, however, that the State's brief was filed and the cause was submitted on oral argument.

8. Although counsel are correct in stating that the Attorney General possesses the power of supervision over the prosecuting attorneys, and that he may intervene in the prosecution of any criminal case, that privilege is seldom exercised. And in the Supreme Court the Solicitor General has charge of state cases.[9]

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[9] Mich. Revised Stat., chap. 10, § 28, as amended by Act No. 144, Pub. Acts 1939; Mich. Stat. Ann. Cump. Supp. 1947 § 3.181.

IV

The Argument

Point One[10]

Petitioner's claim that he was denied due process because the preliminary examination required by Michigan law was conducted by the circuit judge who issued the warrant after a grand jury investigation, and because the same judge heard his subsequent motions, was not made in the court of first instance; and it was abandoned in the court of review.

Petitioner's contention is as follows: (1) under the laws of the state of Michigan,[11] a circuit judge is not a magistrate and may not conduct a preliminary examination; (2) that he was entitled to have his case heard before a judge or magistrate who had not previously determined it; therefore, his right to due process was denied when the circuit judge who issued the warrant, presided at the preliminary examination, and heard his motion to quash (872) and his motion for a separate trial (875).

The short answer is that such questions were not properly raised below.

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[10]

This covers petitioner's points I and II, brief, pp. 14-18.

[11]

Mich. Code of Criminal Procedure, chap. 6, § 1 et seq., defining the procedure on preliminary examination (3 Comp. Laws 1929, § 17193 et seq. [Stat. Ann. § 28.919 et seq.]); and id., chap. 7 § § 3 and 4 (3 Comp. Laws 1929, § § 17217 and 17218 [Stat. Ann. § 28.943 and 28.944]), pertaining to grand jury investigations.

1. Petitioner did not see fit, in settling his bill of exceptions, to include a transcript of the preliminary examination or the magistrate's return; and there is a gap in the printed record between the warrant (7-10) and the information (11). Had he intended to stress the point now emphasized, he should have done this. There is, therefore, no record of any protest the petitioner may have made during the preliminary examination.

2. Although petitioner assigned as one of the grounds of his motion to quash the information, that the prosecution by the people was a violation of the due process clause of the Fourteenth Amendment (873), he failed to point out in what respect his constitutional rights had been violated; and he certainly did not in that connection question the right of the circuit judge to preside over his preliminary examination; nor was the objection raised in his motion for a separate trial (875-877). No affidavit of prejudice was filed; the point was not made during the progress of the trial itself, or in the motion for new trial (878).

3. It was not until an appeal had been taken (800-801) that petitioner raised the question in Nos. 2 and 3 of his assignments of error (803). But having raised it there, he abandoned the question.

4. The question was abandoned in petitioner's brief because it was not included in appellant's statement of questions involved, and it was not discussed in argument.

In view of the foregoing we hereby request of the Court its permission to file 8 copies of the petitioner's brief in the Supreme Court of the State of Michigan.

5. And finally, be it said, the Supreme Court of the State of Michigan did not pass upon the foregoing questions.

Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of writ of error (or certiorari) from this Court,

Hulbert v. Chicago, 202 U.S. 275;

Cox v. Texas, 202 U.S. 446.

Point Two

No member of the Michigan Supreme Court was disqualified to sit and determine the issues involved; nor was the question raised in the court below.

Counsel for petitioner are misinformed or mistaken as to the facts when they state, brief, pp. 18-19:

> "Justice John Dethmers was Attorney General of the State of Michigan during the time of the trial of this case in the circuit court for the county of Ingham and during all of the time that the matter was being appealed to the Supreme Court up to some time in the Fall of 1946 when he was appointed to the Supreme Court to fill a vacancy. During that time the case was tried, the matter was appealed to the Supreme Court, the bill of exceptions settled and filed and the record printed, bill of exceptions being settled March 19, 1946 (14), and petitioner's brief was filed September 11, 1946".

As disclosed by our counter-statement of the case, Attorney General Dethmers had no part in the prosecution of the case against Senator Delano; he was never consulted

in the matter; he did not intervene in the cause at any stage of the proceedings; and the prosecution was conducted by a special prosecuting attorney, not by an appointee of the Attorney General.

The bill of exceptions was settled in behalf of the State by prosecuting officers who tried the case, not by any member of the office of the Attorney General; and the record when printed carried the names of the prosecuting attorney and his assistants as counsel for the State. The name of Attorney General Dethmers does not appear throughout the entire record, and petitioner's brief was filed two days after he had been sworn in as a member of the Supreme Court.

It was not until January 1947 that the Solicitor General assumed charge of the cause on appeal and, in collaboration with others, prepared the State's brief.

Petitioner also says, p. 21, 'that the order denying the motion for rehearing bears the name of Leland W. Carr, Chief Justice . . If Judge Carr (who as circuit judge issued the warrant) did so participate then petitioner has not had fair consideration of his motion for rehearing and due process of the law has again been denied him'.

Again, counsel are mistaken; the Chief Justice did not participate in the court's consideration of petitioner's motion for rehearing; inclusion of his name on the printed order is a clerical error presently rectified by a corrected certified copy of the journal entry duly transmitted to the clerk of this Court.

Moreover, counsel for petitioner raised no objection by means of an affidavit of prejudice or otherwise, to the participation of Mr. Justice Dethmers.

Point Three

Petitioner did not specially set up or claim that remarks of the prosecuting officer denied him due process of law; and there is no substance to his present claim.

While it is true that in his 9th assignment of error (804) petitioner stated that 'because of the continuous, studied, and wilful prejudicial misconduct of the special prosecutor . . during the process (sic) of the trial in his repeated derogatory and belittling remarks directed to . . (defense) counsel, . . which remarks were calculated to and did bias the jurors . . . resulting in a miscarriage of justice', he never urged that he had thereby been denied due process of law.[12]

In his brief filed below counsel posed the question in a manner clearly indicating a non-federal problem:

> "Did the continuous, studied and wilfully prejudicial conduct of the special prosecuting attorney, during the process of the trial, amount to reversible error?"

He did not inquire whether such conduct resulted in dissolution of the trial court, thus depriving the petitioner of his liberty without due process of law; and in arguing the point, he only cited Michigan decisions. One looks in vain

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[12]

The term 'miscarriage of justice', as used in the foregoing assignment probably indicates the pleader's intent to bring himself within that provision of the Michigan code of criminal procedure which forbids reversal of a judgment or verdict unless the error assigned 'has resulted in a miscarriage of justice'. Mich. Code of Criminal Procedure, chap. 9, § 26; 3 Comp. Laws 1929, § 17354; Mich. Stat. Ann. § 28.1096.

for citation of the federal authorities on which defense counsel now relies, including

Buchalter v. State of New York,
319 U.S. 427.

The court below had this to say of such remarks:

> "Space will not permit us to enumerate these remarks in detail. In many instances these statements were made without being followed by objections by defense counsel, while in other instances when rulings were requested, such rulings were given and the jury instructed upon the same. . . We have examined the record carefully and note that the case was hotly contested, but we are not convinced that the remarks complained of influenced the jury adversely to the rights of the defendants". 318 Mich. 568-569.

That opinion is based upon sound doctrine to which the Michigan Supreme Court is committed:

> "Great care should be taken by prosecuting officers and trial courts that no statement be made in the presence of jurors which would jeopardize a defendant's rights to a fair trial. But in the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial if they are made in good faith, and, when fairly construed, they do not appear to have been such as influenced the jury adversely to the rights of the accused".

People v. Burnstein, 261 Mich. 534, 538.

There are several answers to petitioner's present claim that he was denied due process of law:

1. The defendants were represented by competent counsel throughout the trial whose duty it was to aid the court by calling attention to any failure to proceed with propriety.

People v. Frontera, 186 Mich. 343, 346.

"It is the (Michigan) rule in criminal as well as in civil cases, that the attention of the trial court must be directed to improper argument by timely objections, and its propriety at once determined by a ruling of the trial judge. Exceptions to argument, where no ruling is asked for or obtained, will not be considered on appeal. The object of the rule is to have all such alleged errors corrected by the trial court, if correction is necessary".

Gillespie, Michigan Criminal Law & Procedure, Vol. I, § 498, pp. 608-609, footnotes 16 and 17.

As the Court will observe in scanning the record, statements of the prosecuting officer, in the majority of instances, were made without objection by defense counsel, and no judicial ruling was requested or obtained; indeed, in most of them, argument between opposing counsel was carried forward by the defense on the same plane of repartee. As the Michigan court has said:

"Such colloquies between court and counsel are not unusual in the trial of causes, and especially in criminal cases, and the average juror knows it and understands it. He does not charge up against the client all the unpleasant things that may be said to counsel",

> *People v. Kimbrough,* 193 Mich. 330, 334, speaking of a remark of the trial judge, but applicable in principle, we think, to remarks of opposing counsel.

Although the appellants in the court below contended (brief, pp. 6292) that 'continuous, studied and wilful prejudicial conduct of the special prosecuting attorney' amounted to reversible error, they withheld such a contention from the court of first instance until the verdict had been rendered and a motion for a new trial had been filed. They failed to ask for a declaration of mistrial when the remarks were made. And now, for the first time in any court they claim that petitioner was denied due process of law. Such a legalistic ambush is seldom tolerated.

Since it would be impossible (in a summary brief) to discuss each of the many assignments of error based on such remarks, a few will suffice merely by way of illustration:

Assignment No. 25

During cross-examination of the people's witness Fred Chase, secretary of the senate, by counsel for Sherman, the question was asked whether Chase could tell the dates on which bills were introduced by Senator Burhans (not the bill in question). The prosecutor objected on the ground that this was going too far afield (272), and the court stated the objection would be sustained because 'that shows in this book here now what bills he introduced and that is already in'.

Then, the following took place (272-273):

"**Mr. Platt** (Counsel for Sherman): Your honor, we sat

here for an hour and a half and Mr. Sigler read everything in the book—

Mr. Sigler: I ask that remark be stricken from the record and the jury instructed to disregard it.

Mr. Platt: The exhibit number 1, which contains—

Mr. Sigler: *In addition to that, the court has ruled, and counsel ought to be courteous enough to follow the court's ruling, without arguing with him.*

The Court: Go ahead. If there is anything of importance, I am not here to interfere with your putting it in. There is no use of cluttering up the record with a lot of unnecessary things, that is all I am interested in.

Mr. Platt: We simply introduced that and were not permitted, while the prosecution were allowed—

The Court: Just a minute, I am not allowing the prosecution to do anything I wouldn't allow you to do. If there is an objection, I will sustain it. I sustained the objection, now go ahead".

The italicized words on which error was predicated, when restored to their context, appear harmless; and if otherwise, it seems to us it was the duty of trial counsel to direct the judge's attention to their degree of prejudice. But instead of objecting to them as prejudicial, he continued to press his argument on admissibility of the testimony. This, we submit, is a perfect example of combing the record for cold scraps of error on which to build an appeal. And counsel entirely overlooked the remark of a defense attorney which seems to have started the 'tiff'.

Assignment No. 28

The remark here complained of (275) followed further cross-examination on the subject of committee clerks or stenographers (argument with the witness Fred Chase). The prosecutor said:

> "We are not trying this like a bunch of small boys, and I object to that kind of conduct on the part of counsel".
>
> No objection was made to this statement, but
>
> "**The Court**: All right, let's get along. The jury understands, they are intelligent people".

We respectfully submit that took care of the situation. The gentle jab drew no blood, and the remarks could not possibly prejudice the rights of the accused.

Assignment No. 31

Appellants' counsel object to a remark (290) of the prosecutor (made during the State's direct examination of McDonald) to the effect that he would 'show you plenty before we get through'. But the remark, as we view it, was self-invited, and no objection was interposed. Here is the interchange between counsel:

> "**Q.** . . . What was the discussion between your group concerning Carl DeLano's activity on that bill, then?
>
> **Mr. Blackman**: I object to that, that there is no evidence here of any conspiracy. There is no proof of the corpus delicti. There is nothing to connect Carl DeLano with it.

Q. You can't put in all the evidence of a conspiracy at once.

Mr. Blackman: I know, but you haven't shown any yet.

Mr. Sigler: *Well, we will show you plenty before we get through.* [This is the remark on which error is assigned].

Mr. Blackman: Maybe you won't.

The Court: Well, go ahead, take it subject to Mr. Blackman's objection if it leads up to this charge. All this, of course, is mere historical background prior to 1939".

The ruling was accepted from there on, and counsel for petitioner did not object to the remark, but chose to reply in kind. We respectfully submit the episode was harmless.

Assignment No. 61

Counsel complain that 'Mr. Sigler said to Mr. Kennedy: "Well, you are not the only lawyer here, though. You may be surprised to know that" (467). And the following transpired:

"**Mr. Kennedy:** I am not surprised to know that, Mr. Sigler. Certainly, your honor, I take exception—

The Court: State your question, and I will make a ruling on it. Make your questions at this time".

The reason for the exchange of pleasantries was that the special prosecutor interpreted questions of one of the other defense counsel as having opened the door to examination

regarding Williams' background. Mr. Kennedy objected to re-direct examination on the ground that his questions had been specifically limited to 1938 and 1939. The prosecutor merely pointed out that his re-direct examination was based upon cross-examination by one of the other defense counsel.

And certainly petitioner's counsel made no objection to the remark directed to Mr. Kennedy, who, by-the-way, represented clients who were acquitted.

We respectfully submit that the foregoing will suffice to illustrate the points which counsel have urged. The incidents involved are likely to occur in the trial of any criminal case.

> "The trial of this case was, of necessity, lengthy, but a mistrial should not be declared in consequence of mere irregularities which are not prejudicial to the rights of the persons prosecuted. . . . . 'The test is not whether there were some irregularities but instead did the defendants have a fair and impartial trial' ",
>
> *People v. Watson*, 307 Mich. 596, 606.

> "It is quite impossible in a heated trial of this character wherein counsel are strenuously asserting their respective contentions that some remark may not be made by either court or counsel which might better be omitted",
>
> *People v. Reading*, 307 Mich. 616, 625.

2. In many instances where objections were raised to remarks of the special prosecutor, error, if any, was corrected by proper judicial instruction.

Here are two examples:

Assignment No. 55

During cross-examination of Dr. McDonald by counsel for defendant Alden, the prosecutor observed (449):

"Exhibit 41 (minutes of the ANA), the 30th of April, they raised some money, don't you know, to pay the boys" (assigned as error).

The following then occurred:

"**Q.** Now, Mr. Sigler, you know better than that.

Mr. Sigler: No, that is what they did. That is what it says here.

Q. I object to the statement of counsel.

Mr. Sigler: I am just trying to be helpful to my distinguished brother, your honor.

The Court: *The jury will please bear in mind the nature of the conversation that has just taken place. It is just between counsel, not evidence in the case".*

Counsel now add that the special prosecutor later admitted (449) 'that there was no such statement or matter in the records' (of the ANA). We respectfully submit the prosecutor is to be commended for having corrected his error, and that the court's instructions cured it. Moreover, the remark proved harmless, for there is ample proof to justify the jury in believing that money was raised at this meeting to pay legislators.

Assignment No. 84

On page 70 of the DeLano brief, counsel stated: 'Referring to an objection by Mr. Blackman, Mr. Sigler said: "Just a second, if the court please, my obstreperous brother here, he knows that is not a proper foundation for a question or objection" ' (539).

> "**Mr. Blackman**: I object to being called obstreperous. I have a right to protect my client and I object to that and ask the jury be instructed to disregard it.
>
> **The Court**: All right, they may disregard it. The jury understands what is transpiring. You are intelligent people. Go ahead and put your question".

The word 'obstreperous' has several shades of meaning, and it is possible the prosecutor merely intended to convey the thought that opposing counsel was 'clamorous in opposition' (Century Dictionary). But whatever was meant, the remark was cured in the manner requested by the offended party.

3. It may also be noted that defense counsel complained of remarks made by the prosecuting officer to counsel for defendants thereafter acquitted by the jury (573, 577, 578, 593, 600, 602, 603, 681). Surely this is some evidence of the fact that the jury were not biased or prejudiced by such remarks.

We respectfully submit, as we contended in the court below, it is not good practice nor is it fair for defense counsel to await conviction in a criminal case and then, for the first time, comb the cold record for any remarks of the prosecuting officer which might be urged as error or denial of due process; it is not fair to the trial judge.

Point Four

Petitioner was prosecuted for an offense punishable under the laws of the State of Michigan and in so holding the court below decided a non-federal question.

Section 505 of the Michigan Penal Code provides:

> "Sec. 505. Any person who shall commit any indictable offense at the common law, for the punishment of which no provision has been expressly made by any statute of this state, shall be guilty of a felony, punishable" etc. 5 Comp. Laws 1929, Mason's Supp. 1940, § 17115-505; Mich. Stat. Ann. § 28.773.

The Michigan Supreme Court has repeatedly held, by virtue of the foregoing statutory provision, that a conspiracy to obstruct justice, or to commit an otherwise corrupt act, or to accomplish some other unlawful end, or a lawful end by unlawful means, is punishable as a criminal offense under the law of this State:

People v. Tenerowicz, 266 Mich. 276;

People v. McKenna, 282 Mich. 668;

People v. Smith, 296 Mich. 176;

People v. Causey, 299 Mich. 340;

People v. Ryan, 307 Mich. 610;

People v. Roxborough, 307 Mich. 575; cert. denied, 323 U.S. 749; rehearing denied, 323 U.S. 815;

People v. Ormsby, 310 Mich. 291;

People v. Norwood, 312 Mich. 266;

People v. Heidt, 312 Mich. 629.

The court below held that the offense charged in the information filed in this cause, *viz.*, a conspiracy to corrupt the legislature by means of bribery, was an offense known to the law of Michigan, and punishable thereunder.

Counsel contends that in so holding the court below denied him due process of law. He argues 'there can be no conspiracy to commit a crime where a concert of action and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed', and he applies the principle known as the 'Wharton Rule' to cases of bribery. And it is said that this rule 'has become a part of the common law of the United States'.

A sufficient answer, at least for the present purpose, is that the conspiracy involved in this cause was much broader in scope than a single criminal transaction between a bribe-giver and a bribe-taker.

The common-law conspiracy charged in the State's information (which the jury by their verdict found to exist) was broad in scope, far-reaching in effect, and it required an ever-increasing number of participants, whereas the Wharton rule as exemplified in the *Dietrich* case on which counsel relies,

United States v. Dietrich, 126 Fed. 664,

has a short reach and a narrow scope. The agreement or transaction stated in the *Dietrich* indictment, 126 Fed. 666, 'was immediately and only between two persons, one charged with the intended taking and the other with the intended giving of the same bribe'.

In the case at bar, we have members of a group organized to promote a bill to legalize the practice of a profession in which they were hoping to engage; we have proof of a common intent to procure its enactment 'by paying legislators'; we have the hired lobbyist (a member of the group) who engineers for them a growing scheme of dishonesty and corruption, who arranges the introduction of the bill in the senate by agreeing to pay two of its members (Shea and Howell) the 'cost' of such legislative process, who raises from his co-conspirators the amount thus demanded, and who pays the money therefor. We have evidence of the further payment of money to these members of the senate to get the bill out of the committee which has it in charge. And, in furtherance of such a general scheme of corruption, we have evidence that the hired lobbyist of this group paid $2,000 raised from its members, to a member of the senate (DeLano) who agreed to use it as best he could to influence members of a house committee to release the bill, and thus assure its final passage.

It cannot be said, we think, that the rule in the case of *United States v Dietrich, supra,* applies to this case.

Was the 'end' of the combination thus formed, 'unlawful'? Our answer is, its object was corrupt, dishonest and a fraud on the sovereign State,

Glasser v. United States, 315 U.S. 60, 66;

United States v. Manton, 107 F 2d 834, 839;

People v. Tenerowicz, 266 Mich. 276;

if such an end were attained, it would have an evil influence on society, if it would not destroy it entirely,

Smith v. People, 25 Ill. 17;

and it would 'by reason of the power of the combination' be 'particularly dangerous to the public interests',

Comm. v. Waterman, 122 Mass. 43, 57.

The conspiracy in this case is doubly vicious, for not only was it a combination 'to accomplish an unlawful end', *People v. Di Laura,* 259 Mich. 260, but it was a wide-spread agreement to accomplish the unlawful end of corrupting the legislature by 'the unlawful means' of bribery. For if one may stomach the idea that the corruption of a legislature is not an unlawful end, he will not retain it long when he considers the unlawful means planned to be employed by the conspirators.

And, finally, we can detect no fine distinction between a conspiracy to obstruct justice *(Manton, Glasser, Tenerowicz, supra),* and a conspiracy to corrupt legislation and thus obstruct the normal processes of a democracy.

We, therefore, respectfully submit that the petitioner was convicted of an offense punishable under the laws of the State of Michigan, and that the court below, in so holding, decided a non-federal question.

V

Conclusion

We, therefore, respectfully submit that since no federal question of substance was raised in the court below, the petition for certiorari should be denied.

Respectfully Submitted,

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IN THE

STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Respondent's Rejoinder to Petitioner's Reply Brief

EDMUND E. SHEPHERD
Solicitor General of the
State of Michigan
Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1947

No. 623

CARL F. DELANO, Petitioner

v.

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IV

The Argument [*]

Point One

The question whether petitioner was denied due process because the same judge who issued the warrant also presided as examining magistrate and heard preliminary motions, was not properly raised below.

We deem it necessary to answer certain statements set forth in petitioner's reply brief:

[*] In this rejoinder we follow the framework of our brief opposing the petition for certiorari.

1. We are chagrined to note our mistake in stating that a transcript of the preliminary examination was not included in the record, and we hasten to acknowledge the error and to apologize therefor. The point we desired to emphasize, however, was that petitioner did not protest that the judge who conducted the investigation and issued the warrant, also acted as examining magistrate and passed upon certain motions.

2. On page 8 of his reply brief, counsel takes the position that under Michigan law he did not have to object to 'the grand juror, examining magistrate and circuit judge, Hon. Leland W. Carr, presiding at the examination or passing upon his motion to quash and motion for separate trial', urging that the fact that the judge did so act, although disqualified, divested him of jurisdiction. And, he adds: 'No affidavit of prejudice is necessary in the State of Michigan and the question may be raised for the first time on appeal',

Counsel, however, has overlooked (quite inadvertently) decisions of the Michigan Supreme Court:

People v. Ferrise, 219 Mich. 471;

People v. Butler, 221 Mich. 626;

Crowley, Milner & Co. v. —Judge, 239 Mich. 605;

Kolowich v. Ferguson, Judge, 264 Mich. 668.

In the leading case of *People v. Ferrise, supra,* the court held (syl. 2) 'that a judge of the recorder's court of Detroit acted as a police magistrate at the preliminary examination . . and held defendant for trial, would not disqualify him from acting as trial judge in said case in the absence of a claim of personal bias or prejudice on the part of the judge'.

That decision was followed in *People v. Butler, supra,* where the defendant-appellant contended that a judge of the trial court was disqualified to conduct the trial because he was examining magistrate on the examination and because the case was assigned to him by the presiding judge on the advice of the prosecuting attorney. The Supreme Court said:

> "In the administration of the criminal law it is never proper to permit the prosecuting attorney to have any part in the selection of a judge to try his accusations. However, as there is no claim of bias or prejudice on the part of Judge Marsh, he cannot be held to be disqualified".

In the case of *Crowley, Milner & Co. v. Judge, supra,* the court laid down the following rule:

> "The rule disqualifying a judge, whether statutory or common law, is predicated upon public policy, and, if prejudice or bias is the reason alleged, there must be prejudice or bias in fact. Such prejudice or bias can never be based solely upon a decision in the due course of judicial proceedings" (239 Mich. at p. 613).

And, after citing sister-state authority, the court continued:

> "Else such be the rule any dissatisfied party, upon a hearing for a temporary injunction, temporary receiver, or other interlocutory matter, can assert prejudice or bias and recuse the judge".

And in *Kolowich v. Ferguson, Judge, supra,* the court adhered to the same rule.

3. In his reply, p. 4, counsel states this question was raised on page 24 of the brief filed for petitioner in the court below.

On that page of counsel's brief, and as a part of his 'Statement of Facts', it is said that the respondent further claims that the conviction should be set aside for certain assigned reasons, the first of which reads as follows:

> "1. Because the arrest, arraignment, trial, conviction and sentence of the respondent Carl F. DeLano, violates the provisions of the fifth and fourteenth amendments to the Constitution of the United States, in that the said respondent . . has been deprived of liberty and property without due process of law, and that he has been denied the equal protection of the laws as guaranteed by the said Fourteenth Amendment to the Constitution of the United States".

But it was not stated as a question involved; it gave no hint of the nature of such deprivation; it did not mention the fact that the circuit judge had issued the warrant and presided at the preliminary examination; it was not presented as a question in argument; and the court below was not asked to decide the precise question.

It should go without saying that under the law of Michigan an assignment of error is supposed to be abandoned if not argued or otherwise insisted upon in the Supreme Court.

Reed v. Civil Service Comm., 301 Mich. 137;

Tribbett v. Village of Marcellus, 294 Mich. 607;

Herbert v. Durgis, 276 Mich. 158.

Point Two

The question of the qualification of Mr. Justice Dethmers to sit, was not raised in the court below.

1. It is said that we have gone outside the record in stating the facts relating to the duties of the Attorney General, and to the non-participation of Mr. Dethmers in the prosecution of this case while Attorney General.

The answer is that there is nothing whatever in the record as it stands to indicate any prejudice or bias on the part of this Justice; and the very fact that petitioner failed to raise the question in the court below made it necessary to depart from the record in order to explain the situation (and it is interesting to note that counsel disputes very few of the facts so stated in our brief).

2. Laying aside everything else said in counsel's reply brief, it comes down to this:

During the trial of the cause in the circuit court, Mr. John R. Dethmers was Attorney General of the State of Michigan. But the record does not disclose that he took any part in the proceedings, or that he exercised his power of intervention. Nor is there any showing, of any kind whatsoever, on the face of the record that he became biased or prejudiced in fact. *Crowley, Milner & Co. v. Judge,* 239 Mich. 605; *Kolowich v. Ferguson, Judge,* 264 Mich. 668.

The record fails to show that petitioner's counsel challenged the right of Mr. Justice Dethmers to sit in the case or participate in the decision. Nor did he raise the question on motion for rehearing.

Counsel says there is no proof in the record that it was not until January 1947 that the Solicitor General assumed charge of the case on appeal. Had counsel raised the question now urged so vehemently, the State would have had opportunity to make such proof. That is one of the factors that make for unfairness when a question of this nature is presented for the first time on application for a writ of certiorari from this Court.

Conclusion

With respect to all other points raised in petitioner's reply we choose to stand on our first brief. And we respectfully submit that the writ of certiorari should be denied.

Respectfully Submitted,

EDMUND E. SHEPHERD
Solicitor General of the
State of Michigan

Counsel for Respondent